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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 130

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

vs.

JACK W. COHEN

No. 131

HARRY B. MITCHELL, FRANCES PERKINS, ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, PETITIONERS

vs.

HARRY W. RUBICKEY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONS FOR CERTIORARI FILED JUNE 13, 1947
CERTIORARI GRANTED OCTOBER 13, 1947

SUPREME COURT OF THE UNITED STATES

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vs.

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ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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1 In the District Court of the United States for the District of Columbia

Civil Action File No. 34267

JACK W. COHEN, 7 N. RESEARCH ROAD, GREENBELT, MD., PLAINTIFF

v.

HARRY B. MITCHELL, 7TH AND F STREETS NW., WASHINGTON, D. C.; LUCILLE FOSTER MCMILLIN, 7TH AND F STREETS NW., WASHINGTON, D. C.; ARTHUR S. FLEMMING, 7TH AND F STREETS NW., WASHINGTON, D. C., DEFENDANTS

Complaint for injunction and declaratory relief

Filed April 12, 1946

To The Honorable Justices of the District Court of the United States for the District of Columbia:

1. Jurisdiction founded on the existence of a federal question. This action involves the Veterans' Preference Act of 1944, 58 Stat. 387; U. S. C. Title 5, § 851, as hereinafter more fully appears.

2. Plaintiff is a citizen of the United States, domiciled in New York City, New York, and presently residing at 7 North Research Road, Greenbelt, Maryland.

2 3. Defendants are the members of the United States Civil Service Commission, and are sued both in their official and individual capacity. All of the defendants maintain their official residence within the District of Columbia. Defendants are charged with responsibility for the administration and enforcement of the provisions of the Veterans' Preference Act of 1944.

4. Defendants have refused to grant plaintiff the status of a preference eligible to which he is lawfully entitled as an ex-serviceman under the provisions of Sections 2 and 18 of the Veterans' Preference Act of 1944.

5. Plaintiff served on active duty as a member of the United States Coast Guard Reserve (Temporary), a branch of the armed forces of the United States during World War II, and was separated therefrom on September 5, 1945, under honorable conditions. The United States Coast Guard Reserve (Temporary) was created and functioned in accordance with the Coast Guard Auxiliary and Reserve Act of 1941, 55 Stat. 11, U. S. C., Title 14, § 301. Plaintiff enrolled as a member of The Coast Guard Reserve (Temporary) on April 13, 1944, with the rank of Seaman First Class, at which time he executed a form entitled "Temporary

Member of the Coast Guard Reserve—Enrollment and Active Duty Assignment," a true copy of said form being attached hereto and marked "Plaintiff's Exhibit One." Plaintiff continued to serve as a member of such Reserve on a part-time active duty assignment, without compensation, until September 5, 1945, at which time he was honorably disenrolled with the rank of Coxswain and presented with a "Certificate of Disenrollment," a true copy of said certificate being attached hereto and marked "Plaintiff's Exhibit Two."

Plaintiff was issued necessary uniform and equipment and
3 received food and quarters while on active duty. At all
times while on active duty, either traveling to or from such duty, or when wearing the uniform prescribed, plaintiff was subject to the laws, regulations, and orders for the government of the Coast Guard and was subject to disciplinary action for any offense committed thereunder.

6. Subsequent to his honorable disenrollment from active duty in the United States Coast Guard Reserve (Temporary), plaintiff applied, on or about September 25, 1945, to the United States Civil Service Commission for recognition as a preference eligible under the provisions of the Veterans' Preference Act of 1944, in accordance with the regulations and procedures of the Civil Service Commission on its prescribed Form 14 entitled "Veteran Preference Claim." Plaintiff was notified by the Civil Service Commission that his claim had been rejected for the reason that his service was in a civilian capacity. A true copy of this rejection, Civil Service Form 3593, is attached hereto and marked "Plaintiff's Exhibit Three."

7. Plaintiff was discharged from his position as a civilian economist, War Department, on October 10, 1945, as the result of a general reduction in force, notwithstanding his efficiency rating of excellent, and is informed and believes that this discharge would not have occurred had he had at that time the status of a preference eligible. Plaintiff is at present employed as an economist with the United Nations Relief and Rehabilitation Administration. Upon completion of certain work upon which he is now engaged, and prior to the end of the current year, he plans to reenter government service. The refusal of defendants to grant plaintiff the status of a preference eligible adversely and directly
affects plaintiff's opportunities for employment in the Gov-
4 ernment and the job classification for which he may be
eligible. Plaintiff's opportunities for tenure, advancement, and reassignment following any subsequent employment by the Government will be adversely affected by the denial to him of the status of a preference eligible. Plaintiff has pursued whatever administrative remedies are available to him in seeking to

obtain a determination of his eligibility for status as a preference eligible, and is without other remedy than this action in seeking to have his rights in this regard determined.

8. On April 4, 1944, prior to the enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission, providing as follows:

C4145–1

"UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

APRIL 4, 1944.

XE: P: S.

"Circular Letter No. 4145 (Manual of Instructions)

Subject: Veteran Preference—United States Coast Guard Reserve,

Regional Directors, and Division Chiefs:

"The following information and instructions are forwarded for your attention and guidance, regarding the present active duty status of members of the United States Coast Guard Reserve.

"1. Active duty performed by members of the United States Coast Guard Reserve since February 19, 1941, the date of the approval of Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, is considered regular active duty as distinguished from training duty. Certificates of discharge from the United States Coast Guard Reserve showing (1) any active duty since February 19, 1941, and (2) honorable or satisfactory separation therefrom are acceptable as proof for preference and such certificates need not be referred to the central office.

"2. Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, made provisions for the enrollment of persons as temporary reservists. During the present war, active duty performed by the temporary members of the Coast Guard Reserve, whether full-time, part-time or intermittently, either with or without pay, including government employees enrolled without pay other than the compensation of their civilian positions, constitutes active service as distinguished from training duty. Membership in the Coast Guard Auxiliary, a nonmilitary organization, does not constitute membership in the armed forces. Many auxiliarists, however, are also enrolled as temporary members of the Coast Guard Reserve, and, in such cases, if they perform active duty, they are in the armed forces. Preference benefits are applicable to the temporary reservists who furnish proof of (1) active duty whether full-time, part-time, etc., and (2) honorable or satisfactory separation ich may be by

release, discharge or disenrollment. Such cases need not be forwarded to the central office unless doubtful in any important particular.

"3. Questions concerning this Circular Letter should be referred to the Preference Sub-Unit, Services Section, Examination & Personnel Utilization Division.

"By direction of the Commission:

L. A. MOYER, *Executive Director.*"

9. Some time in August 1944, following enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued a pamphlet entitled "From Military Service to Civil Service, Answers to Questions of Returning Servicemen and Servicewomen about Federal Employment," which stated that members of the Coast Guard Reserve (Temporary) who had been discharged under honorable conditions were considered members of the armed forces and as such entitled to the status of preference eligible.

10. On November 4, 1944, the United States Civil Service Commission issued the following circular:

"D508–1

"UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

NOVEMBER 4, 1944.

XE: HAP: kds.

"Departmental Circular No. 508

6 "Subject: Status of Members of the U. S. Coast Guard Reserve (Temporary) with Regard to Veteran Preference.

"*To Heads of Departments and Independent Establishments:*

"Members of the Coast Guard Reserve (Temporary) have been enrolled according to the following classifications:

(a) For active full-time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil-service employees of the Coast Guard without pay other than compensation of their civilian positions.

"The Acting Secretary of the Navy has advised the Commission that only those members of the Coast Guard Reserve (Temporary) falling in classification (a) above, should be considered as naval veterans upon discharge.

"In view of the ruling of the Acting Secretary of The Navy, service in the Coast Guard Reserve (Temporary) may be used as a basis for the granting of veteran preference under the Veterans' Preference Act of 1944 only if such service was in classification (a), above, and other conditions necessary to the granting of veteran preference are present.

"The provisions of this circular are effective with respect to preference claims which have been granted, to pending claims, and to future claims.

"Questions concerning this circular may be addressed to the Civil Service Representative assigned to the Agency's Washington or field offices, or to the Examining and Personnel Utilization Division, Preference Sub-Unit, telephone extension 457 (Commission's Central Office), or to the appropriate regional or branch regional office of the Commission.

"By direction of the Commission:

Very respectfully,

L. A. MOYER,
Executive Director and Chief Examiner."

7 11. Defendants are without legal authority or discretion to make or enforce any rule or regulation which denies to plaintiff the status of a preference eligible under the Veterans' Preference Act of 1944. Defendants have acted contrary to the express terms and requirements of that Act in denying plaintiff such status. The action of the defendants in this regard is wholly arbitrary and discriminatory, depriving plaintiff of the rights and privileges conferred upon him by such Act to his immediate and continuing detriment.

Wherefore plaintiff demands judgment as follows:

1. That this court order defendants to classify plaintiff as a preference eligible under the Veterans' Preference Act of 1944, and thereafter to refrain from taking any action which will deny plaintiff such status.

2. That this court adjudge and declare that plaintiff, as a member of the United States Coast Guard Reserve (Temporary) who served during World War II and was separated therefrom under honorable conditions, is entitled to the status of a preference eligible under the provisions of the Veterans' Preference Act of 1944.

3. That plaintiff recover his costs.

4. That plaintiff have such other and further relief as is just.

GERHARD A. GESELL, *Attorney for Plaintiff.*
COVINGTON, BURLING, RUBLEE, ACHESON & SHORB,
701 Union Trust Building, Washington, D. C.

8 *Exhibit One*

TEMPORARY MEMBER OF COAST GUARD RESERVE

ENROLLMENT AND ACTIVE DUTY ASSIGNMENT

From Office of District Coast Guard Officer:

Naval District ..... City ..... State .....
Date .....

To ..... Rank or Rating .....

1. In accordance with the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and Coast Guard Reserve Regulations as amended, and subject to your acceptance and execution of the prescribed oath of office or oath of allegiance, you are hereby enrolled as a temporary member of the United States Coast Guard Reserve, with the rank or rating indicated above, USCGR, class T, from date of oath.

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

1. ☐ Auxiliary members enrolled in class T.
2. ☐ Volunteer Port Security Force.
3. ☐ Enrolled for other volunteer duty, namely .....
4. ☐ Pilots.
5. ☐ Coast Guard Civil Service Employees.
6. ☐ Officers of Great Lakes Vessels.

You are authorized to wear the prescribed uniform only while on active duty and while en route to and from such duty. Members in classifications 1, 2, and 3 will be on active duty only as directed by competent authority for a minimum of 12 hours per week. They will not be subject to transfer without their consent. Members in classifications 4 and 5 will be on active duty and subject to call at all times. Members in classification 6 will be on active duty only during the open season of navigation on the Great Lakes.

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power

and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

---

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) In the case of physical injury in line of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical, but excluding dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at:

In accordance with the above terms and conditions, effective

Accepted _____. Date _____. Enrolling official (By Direction of the Commandant) _____.

Oath of Office (For Officers):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So Help Me God. And I do further swear (or affirm) that I will

use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. So Help Me God.

Subscribed and Sworn to before me this _____ day of _____, 19__.

_____ _____
(*Signature and title*) United States Coast Guard Reserve (*Temporary*)

Oath of Allegiance (For Enlisted Men):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____, do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America, and that I will serve them honestly against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the laws and regulations for the government of the United States Coast Guard.

Subscribed and sworn to before me this _____ day of _____, 19__.

_____ _____
(*Signature and title*) United States Coast Guard Reserve (*Temporary*)

Exhibit Two—Front-Page

10 *Exhibit Two—Back Page*

Enrolled as: Seaman 1c. 6175-260. On 13 April 1944 at Washington, D. C. Ratings held: Seaman 1c. Training Courses completed: Seaman Class and Military Training. Served on active duty for a total of forty-six (46) days. Rating at release Seaman 1c.

11 *Exhibit Three*

U. S. COAST GUARD RESERVE

VOLUNTEER PORT SECURITY FORCE

Part-time duty, without pay.

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

The Commission regrets to inform you that your claim for veteran preference cannot be given favorable consideration under the provisions of the Veterans' Preference Act of 1944 for the reason checked below:

----Service was not performed during a war or in a campaign or expedition for which a campaign badge was authorized.
----Veteran not receiving compensation, pension, or disability retirement benefits.
----Service-connected disability not established.
----Husband not disqualified for Civil Service appointment by reason of service-connected disability.
----Separation not honorable.
----No active duty in Armed Forces.
√ Service in civilian capacity.
----Service in training only.
----Divorced from veteran.
----Remarried after death of veteran.
----Preference not applicable to relatives of veterans. (Exceptions: Widows and wives—under certain conditions.)
----See note on other side.

Jack W. Cohen, 7 N. Research Road, Greenbelt, Md.

12 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]
[File endorsement omitted.]

Answer

Filed June 25, 1946

For answer to the complaint filed in this cause defendants state as follows:

FIRST DEFENSE

1. Defendants admit the allegations of paragraphs 1, 2, 3, 5, 6, 8, 9, and 10 of the complaint.

2. Answering paragraph 4 of the complaint defendants admit that plaintiff was denied the status of a preference eligible, but aver that he was not entitled to such status under the provisions of the Veterans' Preference Act of 1944.

3. Answering paragraph 7 of the complaint, defendants admit the allegations thereof, except that they deny that plaintiff's discharge would not have occurred had he had at that time the status of a preference eligible, and except that defendants are without knowledge or information sufficient to form a belief concerning plaintiff's present employment with the United Nations Relief and Rehabilitation Administration and concerning plaintiff's plans to return to the Government service.

13 4. Defendants deny the allegations of paragraph 11 of the complaint.

SECOND DEFENSE

5. Plaintiff's part-time service as a temporary member of the Coast Guard Reserve did not constitute him an ex-serviceman who had served on active duty in a branch of the armed forces of the United States within the meaning of Section 2 of the Veterans' Preference Act of 1944.

THIRD DEFENSE

6. The complaint fails to state a claim upon which relief can be granted.

WHEREFORE, defendants pray that the Complaint be dismissed and for such other and further relief to which they may be entitled.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney.

Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney,
Attorneys for defendants.

I hereby certify that I have this 2d day of June, 1946, sent a copy of the foregoing answer, by official United States mail, to Covington, Burling, Rublee, Acheson & Shorb, Union Trust Building, Washington, D. C.

Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney.

14 In the District Court of the United States

Civil Action File No. 34267

[Title omitted.]
[File endorsement omitted.]

Motion for summary judgment

Filed Sept. 9, 1946

Plaintiff moves the court as follows:

1. That it enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment in plaintiff's favor for the relief demanded in the complaint, on the ground that there is no genuine issue as to any material fact and that the plaintiff is entitled to a judgment as a matter of law; or, in the alternative,

2. If summary judgment is not rendered in plaintiff's favor upon the whole case or for all the relief asked and a trial is necessary, that the court, at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted, and thereupon making an order specifying the facts
15 that appear without substantial controversy and directing such further proceedings in the action as are just.

This motion is based upon:

(a) The pleadings on file in this action.

(b) The affidavit of plaintiff annexed hereto as Exhibit A.

Wm. Merrick Parker,
WM. MERRICK PARKER,
Attorney for Plaintiff,
701 Union Trust Building, Washington, D. C.

16 *Exhibit "A" to motion*

In The District Court of The United States

Civil Action No. 34267

[Title omitted.]

Affidavit of Jack W. Cohen

CITY OF WASHINGTON,
District of Columbia, ss:

Jack W. Cohen, being sworn deposes and says that prior to October 10, 1945, he was employed as a civilian economist by the United States War Department and that on October 10, 1945 he was discharged as the result of a general reduction in force. Deponent further says that his efficiency rating at the time of his said discharge was that of excellent, and that he was informed by his superiors and others and he himself believes that he would not have been discharged at that time had he been given the status of a preference eligible.

Deponent further says that it is his present desire and intention to reenter the service of the United States Government and
17 that the refusal by defendants to grant deponent the status of a preference eligible adversely and directly affects plaintiff's opportunity for employment in the Government and the job classification for which he may be eligible, as well as his opportunity for tenure, advancement, and reassignment in Government service.

Deponent says that for these reasons the refusal by the defendants to grant him the status of a preference eligible to which he is entitled by law has caused and will in the future cause deponent irreparable injury.

JACK W. COHEN.

Subscribed and sworn to before me this 9 day of September, 1946.

HELEN HYMAWITZ,
Notary Public.

My commission expires Nov. 8, 1948.

18 In The District Court of The United States

Civil Action File No. 34267

[File endorsement omitted.]

Motion of defendants for summary judgment, notice of motion, and affidavits

Filed Sept. 27, 1946

The defendants, upon the pleadings herein, and upon the annexed affidavits, respectfully move the Court for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as a matter of law.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,
Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney,
Attorneys for the Defendants.

19 In the District Court of the United States

Civil Action File No. 34267

[Title omitted.]

Affidavit of Chester A. Anderson

Chester A. Anderson, Captain, United States Coast Guard, being first duly sworn, deposes and says:

1. That he is Chief, Reserve and Auxiliary Division, United States Coast Guard, of which the Temporary Reserve Section is a part. That in his capacity as Chief, Reserve and Auxiliary Division, United States Coast Guard, he has personal and official knowledge of the facts stated herein, excepting those stated upon information and belief, and as to facts so stated he verily believes them to be true.

2. That, pursuant to the authority set forth in Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (14 U. S. C. Sec. 307), the Commandant, United States Coast Guard, undertook to enroll as temporary members of the Coast Guard Reserve approximately 70,000 persons for such duty as was prescribed in the various contracts of enrollment.

3. That, generally, persons who were enrolled as temporary members of the Coast Guard Reserve served in one of the following six classifications:

20 (a) For active full-time duty with military pay and allowances.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms but paid by their own companies.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms but paid by their own companies.

(e) Coast Guard police without pay and allowances.

(f) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions.

4. That the description of the said six classifications is as follows:

(a) Very little, if any, distinction was made between this group and regular members of the Reserve of similar ranks or ratings with the exception that the former were generally limited in the performance of duty to shore stations within the continental limits of the United States and on vessels operating from continental shore bases.

(b) This constitutes that large group of men who for patriotic reason wished to serve a certain amount of time to relieve regular Coast Guard personnel in the protection of our ports and waterfronts and the patrol of these waterfronts. Their service was purely voluntary and their only compensation was a uniform allowance if they consistently served twelve hours a week. This was known as the Volunteer Port Security Force, of which plaintiff was a member.

(c) Pilots throughout the country were enrolled and put in uniforms in officer rank as far as possible comparable to their position of authority as pilots. This was done for military convenience to make it possible to exercise a certain amount of military control over these men in time of war and to clothe them in some military authority.

(d) Ore-carrying vessels going through the Soo Locks were in the minds of many a likely field for sabotage. The examination and search of vessels was a duty ordinarily devolving upon the Coast Guard but the enormity of the job and lack of personnel made it expedient to commission officers of these vessels, again as military convenience, so that they could make the examinations and enjoy the authority which the uniform would give them, as well as the military control over them which the Coast Guard would then have.

(e) The protection of plants vital to the war effort made it necessary for the Army and Navy, whose responsibility for the protection of these plants it was, to militarize the civilian guards at these plants. The Army used the Auxiliary military police but the Navy turned to the Coast Guard for enrollment of these men as temporary members of the Reserve, the objective being
21 the added authority by a member of the military forces and

military control in emergencies. The legal status of these men was never determined to the point where they actually had the authority hoped for, and the Navy abandoned the program upon the advice of Congress, in February, 1944.

(f) It was decided as a matter of administrative policy to enroll as temporary members of the Reserve a number of Coast Guard civilian key employees, both here at Headquarters and in its field offices. Such employees were, for the most part, performing technical and professional services, and due to their close association with military personnel it was determined that the interests of the Service required the militarization of these employees. They continued to perform the same duties, and retained their Civil Service status and received Civil Service pay.

5. That temporary members of the Coast Guard Reserve were not exempted from the Selective Training and Service Act of 1940, as amended, and many temporary members of the Reserve were in fact drafted or did enlist in the regular or regular Reserve components of the armed forces, thereby necessitating their disenrollment as temporary members of the Coast Guard Reserve.

6. That temporary members of the Coast Guard Reserve serving in the Volunteer Port Security Force were not subject to transfer and, indeed, were not transferred without their consent.

7. That temporary members of the Coast Guard Reserve serving in the Volunteer Port Security Force received no pay for such duty. They did, in most cases, receive a uniform allowance and in some cases, food or subsistence allowance while on active duty.

8. That, generally, efforts were made by the Coast Guard to assign duty periods for the convenience of members of the Volunteer Port Security Force so as to interfere as little as possible with hours of their regular civilian employment. Indeed, many members of the Volunteer Port Security Force were disenrolled at their own request upon representations that their duty assignments conflicted with their civilian employment.

9. That plaintiff herein, Jack W. Cohen, was enrolled as a temporary member of the Coast Guard Reserve at Washington,
22 D. C., on April 13, 1944 as a Seaman, first-class, to serve in the Volunteer Port Security Force and was assigned to the Captain of the Port, Washington, D. C. He was disenrolled on September 5, 1945, having served on active duty on fifty-eight (58) days, for a total service of 398 hours.

And further deponent saith not.

Chester A. Anderson,
CHESTER A. ANDERSON,
Captain, USCG.

Dated: June 21, 1946.

CITY OF WASHINGTON,
District of Columbia, ss:

Chester A. Anderson, being duly sworn, says that he has read the foregoing affidavit, and that all statements made therein are true and correct, save that allegations stated to be made upon information and belief he verily believes to be true and correct.

CHESTER A. ANDERSON.

Subscribed and sworn to before me, a Notary Public in and for the District of Columbia this 21st day of June 1946.

[SEAL] EDWARD S. SHANKLE.

My commission expires October 14, 1947.

23 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]

Affidavit in support of defendants motion for summary judgment

CITY OF WASHINGTON,
District of Columbia, ss:

Lawson A. Moyer, being duly sworn, deposes and says:

I am the Executive Director and Chief Examiner of the United States Civil Service Commission, the members of which are named as defendants of the above entitled action. This affidavit is submitted in support of a motion for summary judgment made by the defendants in said action.

On April 4, 1944, by authority vested in it by the Act of June 18, 1929 (46 Stat. 21), and Executive order of April 24, 1931, No. 5610, Executive order of January 18, 1932, No. 5776 and Executive order of June 24, 1938, No. 7915, the United States Civil Service Commission issued Circular Letter No. 4145, a photostat copy of which is attached hereto marked as Exhibit 1, to its regional directors and division chiefs, authorizing the granting of veterans' preference to temporary reservists of the Coast Guard
24 under Public Law No. 8, 77th Congress, the Coast Guard Auxiliary and Reserve Act of 1941. Such preference was to be granted to temporary members of the Coast Guard Reserve, whether full-time, part-time or intermittently, either with or without pay, including Government employees enrolled without pay other than the compensation of their civilian positions.

Thereafter Congress passed Public Law 359, otherwise known as the "Veterans' Preference Act of 1944", approved June 27, 1944, which reads in part:

"SEC. 11. The Civil Service Commission is hereby authorized to promulgate appropriate rules and regulations for the administration and enforcement of the provisions of this Act.

"SEC. 19. It shall be the authority and duty of the Civil Service Commission in all cases under the classified civil service to make and enforce appropriate rules and regulations to carry into full effect the provisions, intent, and purpose of this Act and such Executive orders as may be issued pursuant thereto and in furtherance thereof."

Subsequent to the enactment of the "Veterans' Preference Act of 1944" and pursuant to sections 11 and 19 thereof, the Commission examined its provisions to ascertain if any revision to its then existing rules and regulations pertaining to veterans' preference would be necessary to comply with the Act.

During the course of this study the Commission received a communication from the Acting Secretary of the Navy, a photostatic copy of which is attached hereto marked as Exhibit 2, setting forth that only those persons who served in the Coast Guard Reserve (Temporary) with active full-time duty with pay and allowances at shore stations or on Coast Guard vessels should be classed as veterans upon discharge from the Coast Guard Reserve (Temporary) and that such persons were not entitled to mustering out payments under the "Mustering Out Payments Act" of 1944.

25 A copy of the opinion upon which the Navy made its decision denying "mustering out pay" to members of the Coast Guard Reserve (Temporary) under the "Mustering Out Payments Act of 1944" is attached marked as Exhibit 3.

The Commission, after a careful study of the history of veterans' preference in relation to the provisions of section 2 of the "Veterans' Preference Act of 1944," came to the conclusion that only those members of the Coast Guard Reserve (Temporary) who performed active full-time duty with pay and allowances at shore stations or on Coast Guard vessels were entitled to the benefits of veterans' preference under said Act and, accordingly, promulgated Departmental Circular No. 508 on November 4, 1944, a copy of which is attached hereto marked as Exhibit 4.

The Commission's determination that only those members of the Coast Guard Reserve (Temporary) who performed active full-time duty with pay and allowances at shore stations or on Coast Guard vessels are entitled to veterans' preference under the Veterans' Preference Act of 1944 is consistent with the determination made by the Treasury Department in 1943, briefly stated, "where the pay of a Coast Guard Reserve (Temporary) is received from a civilian employer, or, in the case of a civilian employee of the Government, where the pay is for the civilian position he occupies, the exclusion from gross income provided for in section

22 (b) 13 of the Internal Revenue Code is not applicable," ($1,500 exemption for members of the armed forces for active service in such forces.) A copy of such determination is attached hereto marked as Exhibit 5.

The Commission's denial of veterans' preference to Coast Guard Reservists (Temporary) who serve less than full-time with pay and allowances is consistent with the Administrator's Decision, Veterans' Administration #699, denying such persons bene-
26 fits under the Acts administered by the Veterans' Administration, a copy of which is attached hereto marked as Exhibit 6.

The United States Civil Service Commission's Departmental Circular No. 508 since November 4, 1944 has been and is now in force and effect, and was in force and effect at the time of the denial of veteran's preference to plaintiff under the "Veterans' Preference Act of 1944."

Lawson A. Moyer
LAWSON A. MOYER.

Sworn to and subscribed in my presence this 20 day of August 1946.

R. E. SENEDER,
Notary Public for the District of Columbia.

My commission expires Jan. 1, 1951.

27 *Exhibit 1* C4145–1

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

APRIL 4, 1944.
XE:P:S

Circular Letter No. 4145 (Manual of Instructions)

Subject: Veteran Preference—United States Coast Guard Reserve.
Regional Directors, and Division Chiefs:

The following information and instructions are forwarded for your attention and guidance, regarding the present active duty status of members of the United States Coast Guard Reserve.

1. Active duty performed by members of the United States Coast Guard Reserve since February 19, 1941, the date of the approval of Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, is considered regular active duty as distinguished from training duty. Certificates of discharge from the United States Coast Guard Reserve showing (1) any active duty since February 19, 1941, and (2) honorable or satisfactory separa-

tion therefrom are acceptable as proof for preference and such certificates need not be referred to the central office.

2. Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, made provision for the enrollment of persons as temporary reservists. During the present war, active duty performed by the temporary members of the Coast Guard Reserve, whether full-time, part-time, or intermittently, either with or without pay, including government employees enrolled without pay other than the compensation of their civilian positions, constitutes active service as distinguished from training duty. Membership in the Coast Guard Auxiliary, a nonmilitary organization, does not constitute membership in the armed forces. Many auxiliarists, however, are also enrolled as temporary members of the Coast Guard Reserve, and, in such cases, if they perform active duty, they are in the armed forces. Preference benefits are applicable to the temporary reservists who furnish proof of (1) active duty whether full-time, part-time, etc. and (2) honorable or satisfactory separation which may be by release, discharge or disenrollment. Such cases need not be forwarded to the central office unless doubtful in any important particular.

3. Questions concerning this Circular Letter should be referred to the Preference Sub-Unit, Services Section, Examination & Personnel Utilization Division.

By direction of the Commission:

L. A. Moyer,
L. A. Moyer,
Executive Director.

28 *Exhibit 2*

THE SECRETARY OF THE NAVY
WASHINGTON

U. S. CIVIL SERVICE COMMISSION,
Washington 25, D. C.

MY DEAR COMMISSIONERS: It has been brought to my attention that a ruling exists to the effect that all members of the U. S. Coast Guard Reserve (Temporary) are members of the Armed Forces on active duty and, as such, are entitled to veterans rights upon discharge.

I have had an investigation of this matter and have arrived at the conclusion that only those members of the Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who, by reason thereof, are eligible upon separation from the service to mustering out payments under the "Mustering Out Payment Act" of 1944 should be considered as naval veterans upon discharge.

I have been informed that the following are the classifications in which the Coast Guard Reserve (Temporary) have been enrolled.

(a) For active full time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part time or intermittent duty without pay and allowances other than for uniforms. Duty in this classification is usually for a period of twelve hours per week.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil Service employees of the Coast Guard without pay other than compensation of their civilian positions.

As a result of my investigation as set forth above, it would appear that only those under classification (a) should be classed as naval veterans upon discharge from the Coast Guard Reserve (Temporary).

Sincerely yours,

RALPH A. BARD,
Acting Secretary of the Navy.

29 *Exhibit 3*

DEPARTMENT OF THE NAVY

Office of The Judge Advocate General

WASHINGTON 25, D. C.

In Reply Address The Judge Advocate General of the Navy and Refer to No. JAG:II:WJG:z. L16–4/ET14.

12 APR. 1944.

To: Commandant, U. S. Coast Guard.

Subject: Eligibility of temporary members of Coast Guard Reserve to receive mustering-out pay.

Reference: Ltr., with enc., Comdt., USCG. to SecNavy, 28 Feb. 1944, file CG–784.

Enclosure: Copy of approved opinion of Judge Advocate General of the Navy, dated 11 April 1944, file JAG:II:WJG:z over L16–4/ET14, re Eligibility of temporary members of Coast Guard Reserve to receive mustering-out pay.

1. The enclosure is forwarded for information and is self-explanatory.

By direction of the Judge Advocate General.

(S) L. H. C. JOHNSON,
Commander, U. S. N. (Ret.).

30 DEPARTMENT OF THE NAVY

Office of The Judge Advocate General

WASHINGTON 25, D. C.

In Reply Address The Judge Advocate General of the Navy and Refer to No. JAG:II:WJG:z. L16-4/ET14.

APR. 11, 1944.

To: The Secretary of the Navy.

Subject: Eligibility of temporary members of Coast Guard Reserve to receive mustering-out pay.

Reference: Ltr., with enc., Comdt., USCG. to SecNavy, 28 Feb. 1944, file CG-784.

1. In the reference decision is requested as to whether temporary members of the Coast Guard Reserve performing full time or part time duty without military pay are eligible on disenrollment for mustering-out payments under the provisions of the Mustering-Out Payment Act of 1944, approved 3 February 1944 (Public Law 225—78th Congress).

2. Section 1 (a) of the Mustering-Out Payment Act of 1944 provides that "each member of the armed forces who shall have been engaged in active service in the present war, and who is discharged or relieved from active service under honorable conditions on or after December 7, 1941, shall be eligible to receive mustering-out payment." The phrase "member of the armed forces" as used in said section 1 (a) is defined in section 6 (a) of the cited Act to include any member of the United States Coast Guard or its components. Section 1 (b) of the Mustering-Out Payment Act of 1944 specifically enumerates certain members of the armed forces who are not entitled to receive mustering-out pay, but no mention is made therein of temporary members of the Coast Guard Reserve, who undoubtedly are members of the armed forces. (Sec. 204, Coast Guard Auxiliary and Reserve Act of 1941, as amended, 14 U. S. C. Supp. II, 304, id., sec. 209, 14 U. S. C. Supp. II, 309; ltr. Acting Sec. Navy to Commissioner of Immigration and Naturalization, Dept. of Justice, 7 Feb. 1944, file JAG:J:JL:amp.) Since temporary members of the Coast Guard Reserve are not in terms excepted from the cited statute as being ineligible to receive the benefits therein prescribed, it would appear that they are entitled to said benefits unless otherwise precluded therefrom.

31 3. It is stated in the reference that, pursuant to section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (14 U. S. C. Supp. II, 307), approximately 70,000 persons are enrolled as temporary members of the Coast Guard

Reserve for full time or part time and intermittent active duty with or without pay, including "Government employees without pay other than compensation of their civilian positions"; and that, pursuant to such authority, temporary members of the Reserve have been enrolled under formal contracts for the duration of the war, unless sooner terminated by the Coast Guard, in the following classifications:

(a) For active full time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part time or intermittent duty without pay and allowances other than for uniforms. Duty in this classification is usually for a period of 12 hours per week. The enrollee is in a military status only when engaged in such duty or when en route to or from such duty.

(c) Pilots without pay and allowances other than for uniforms. Enrollees in this classification are considered on active duty and subject to call at all times.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms. Enrollees in this classification are on active duty only during the open season of navigation on the Great Lakes.

(e) Coast Guard police without pay and allowances. Enrollees in this classification are on active duty and subject to call at all times while they are employed as plant guards.

(f) Civil Service employees of the Coast Guard without pay other than compensation of their civilian positions. Enrollees in this classification are on active duty at all times.

4. It thus appears that temporary Reservists enrolled in the above classifications (b) to (f), inclusive, do not receive
32 military pay or allowances other than uniform allowances, that they retain their civilian positions held at time of enrollment and "work at them for full pay either at the same time that they are performing their military duties, or at times when they are not performing military duties," and finally, that they are employed on active duty for full time or part time and intermittent periods as mentioned above. The status of the personnel covered by subparagraphs (b) to (f), supra, raises the question whether such temporary Reservists properly come within the terms of the Mustering-Out Payment Act of 1944.

5. Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, provides:

"The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time

and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard, and such persons (including Government employees without pay other than compensation of their civilian positions) who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Territories or possessions, including the Philippine Islands, to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve."

6. Under the terms of Section 207, supra, temporary members of the Coast Guard Reserve may be enrolled for duty either with or without pay. While the term "mustering-out pay" is not used in the Mustering-Out Payment Act of 1944, nevertheless, payments thereunder are considered to constitute pay, which is additional to the pay to which the veteran was entitled at the
33 time of his discharge or relief from active service. The view that amounts payable under the Mustering-Out Payment Act of 1944 represent pay is amply supported by the legislative history of the mustering-out pay legislation, wherein the payments proposed to be made to discharged veterans were repeatedly and specifically referred to as "mustering-out pay." (Cong. Rec., 18 Jan. 1944, p. 351 et seq.; House Committee on Mil. Affairs, Report 986, on S. 1543, Senate Committee on Mil. Affairs, 1 Dec. 1943, pp. 1, 4, 5, 7.).

7. It is also pertinent to point out that the President in his message to the Congress of the United States on 23 November 1943, requesting postwar benefits for members of the armed services, stated, among other things, that "mustering-out pay will be needed" to help service men and women tide over the difficult period of readjustment from military to civilian life.

8. Since, under their contracts of enrollment, temporary members of the Coast Guard Reserve in classifications (b) to (f), inclusive, supra, have expressly agreed to serve on active duty without pay, a determination that such temporary members should be entitled on disenrollment to mustering-out pay under the provisions of the Mustering-Out Payment Act of 1944, in the absence of an affirmative statutory provision to such effect, would be inconsistent with the terms of their enrollment contract. In

other words, it would be unreasonable to conclude, under the present language of said Act and the legislative history connected therewith, that Congress intended to grant any right to pay in amounts as prescribed in the statute to temporary members of the Coast Guard Reserve who expressly contracted to serve on active duty without pay.

9. In consideration of the foregoing, this office is of the opinion that temporary members of the Coast Guard Reserve, other than those performing full time active duty with pay and allowances, are not eligible, on disenrollment, for mustering-out payments under the Mustering-Out Payment Act of 1944.

T. L. Gatch
T. L. GATCH.

Approved:

FRANK KNOX,
Secretary of the Navy.

34 *Exhibit 4* D508–1

UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

NOVEMBER 4, 1944.
XE: HAP: kds

Departmental Circular No. 508

Subject: Status of Members of the U. S. Coast Guard Reserve (Temporary) with Regard to Veteran Preference.

To Heads of Departments and Independent Establishments:

Members of the Coast Guard Reserve (Temporary) have been enrolled according to the following classifications:

(a) For active full-time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil-service employees of the Coast Guard without pay other than compensation of their civilian positions.

The Acting Secretary of the Navy has advised the Commission that only those members of the Coast Guard Reserve (Temporary) falling in classification (a), above, should be considered as naval veterans upon discharge.

In view of the ruling of the Acting Secretary of the Navy, service in the Coast Guard Reserve (Temporary) may be used as a basis for the granting of veteran preference under the Veterans' Preference Act of 1944 only if such service was in classification (a), above, and other conditions necessary to the granting of veteran preference are present.

The provisions of this circular are effective with respect to preference claims which have been granted, to pending claims, and to future claims.

Questions concerning this circular may be addressed to the Civil Service Representative assigned to the agency's Washington or field offices, or to the Examining and Personnel Utilization Division, Preference Sub-Unit, telephone extension 457 (Commission's Central Office), or to the appropriate regional or branch regional office of the Commission.

By direction of the Commission:

Very respectfully,

L. A. Moyer,
L. A. Moyer,
Executive Director and Chief Examiner.

35 *Exhibit 5*

INCOME TAX.—PART I

A. INTERNAL REVENUE CODE

SECTION 22 (b).—GROSS INCOME: EXCLUSIONS FROM GROSS INCOME

SECTION 19.22 (b) (13)-1: Compensation of Military and naval forces.	1943–22–11562 I. T. 3629

INTERNAL REVENUE CODE

Where the pay of a member of the Coast Guard Temporary Reserve is received from a civilian employer or, in the case of a civilian employee of the Government, where the pay of such an individual is for the civilian position he occupies, the exclusion from gross income (additional allowance for military and naval personnel) provided for in section 22 (b) 13 of the Internal Revenue Code, as amended by section 7 (a) of the Current Tax Payment Act, of 1943, is not applicable. Where, however, a member of the Coast Guard Temporary Reserve is called into active service and is paid by the Coast Guard, he is considered to be in the military forces and the exclusion from gross income applies.

Advice is requested whether members of the Coast Guard Temporary Reserve are entitled to the exclusion from gross income (additional allowance for military and naval personnel) provided for in section 22 (b) 13 of the Internal Revenue Code, as amended by section 7 (a) of the Current Tax Payment Act of 1943.

Section 22 (b) 13 of the Internal Revenue Code, supra, provides as follows:

SEC. 22. (b) EXCLUSIONS FROM GROSS INCOME.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * * *

(13) ADDITIONAL ALLOWANCE FOR MILITARY AND NAVAL PERSONNEL.—In the case of compensation received during any taxable year and before the termination of the present war as proclaimed by the President, by a member of the military or naval forces of the United States for active service in such forces during such war, * * * so much of such compensation as does not exceed $1,500.

Section 22 (b) 13 of the Code applies only to taxable years beginning after December 31, 1942. (See section 7 (b) of the Current Tax Payment Act of 1943.) Section 29.22 (b) (13)-1 of Regulations 111 provides in part that a person is in active service if he is actually serving in the military or naval forces of the United States, not necessarily in the field or in the theater of war, and it also provides that personnel in the inactive reserve or on retirement are not in active service.

The exclusion from gross income of compensation received for active service in the armed forces of the United States is applicable to compensation received from the United States. In the
36 case of members of the Coast Guard Temporary Reserve, the Bureau has been advised by United States Coast Guard headquarters that ordinarily the personnel of the temporary reserve are paid by their civilian employers. The Coast Guard Temporary Reserve consists of individuals who have been enrolled therein for the purpose of investing them with the authority of coast guardsmen.

Where the pay of such an individual is received from a civilian employer or, in the case of a civilian employee of the Government, where the pay is for the civilian position he occupies, the exclusion from gross income provided for in section 22 (b) 13 of the Internal Revenue Code, supra, is not applicable. Where, however, a member of the Coast Guard Temporary Reserve is called into active service and is paid by the Coast Guard, he is considered to be in the military forces and the exclusion from gross income applies.

37 *Exhibit No. 6*

ADMINISTRATOR'S DECISION, VETERANS' ADMINISTRATION, No. 699

MAY 20, 1946.

Subject: Entitlement of Temporary Members of the Coast Guard Reserve to Benefits Under Laws Governing the Veterans Administration.

Question Presented: Are former temporary members of the Coast Guard Reserve within the purview of the statutes providing for National Service Life Insurance, pension, or medical and hospital services, as beneficiaries of the Veterans Administration?

Facts: The Acting Commandant of the United States Coast Guard states that temporary Reservists of the Coast Guard are divided into six classifications, as follows:

"(a) For active full-time duty with military pay and allowances.

"(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

"(c) Pilots without pay and allowances other than for uniforms but paid by their own companies.

"(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms but paid by their own companies.

"(e) Coast Guard police without pay and allowances.

"(f) Civil Service employees of the Coast Guard enrolled for full-time active duty without pay other than compensation of their civilian positions."

In explanation of the six classifications, the Acting Commandant says:

"(a) Very little, if any, distinction is made between this group and regular members of the Reserve of similar ranks or ratings with the exception that the former were generally limited in the performance of duty to shore stations within the continental limits of the United States and on vessels operating from continental shore bases.

"(b) This constitutes that large group of men who for patriotic reasons wished to serve a certain amount of time to relieve regular Coast Guard personnel in the protection of our ports and waterfronts and the patrol of these waterfronts. Their service was purely voluntary and their only compensation was a uniform allowance if they consistently served twelve hours a week.

"(c) Pilots throughout the country were enrolled and put in uniform in officer rank as far as possible comparable to their
38 position of authority as pilots. This was done for military convenience to make it possible to exercise a certain amount

of military control over these men in time of war and to clothe them in some military authority.

"(d) Ore-carrying vessels going through the Soo Locks were in the minds of many a likely field for sabotage. The examination and search of vessels was a duty ordinarily devolving upon the Coast Guard but the enormity of the job and lack of personnel made it expedient to commission officers of these vessels, again as military convenience, so that they could make the examinations and enjoy the authority which the uniform would give them, as well as the military control over them which the Coast Guard would then have.

"(e) The protection of plants vital to the war effort made it necessary for the Army and Navy, whose responsibility for the protection of these plants it was, to militarize the civilian guards at these plants. The Army used the Auxiliary military police but the Navy turned to the Coast Guard for enrollment of these men as temporary members of the Reserve, the objective being the added authority by a member of the military forces and military control in emergencies. The legal status of these men was never determined to the point where they actually had the authority hoped for, and the Navy abandoned the program upon the advice of Congress, in February of 1944.

"(f) It was decided as a matter of administrative policy to enroll as temporary members of the Reserve a number of Coast Guard civilian key employees, both here at Headquarters and in its field offices. Such employees were, for the most part, performing technical and professional services, and due to their close association with military personnel it was determined that the interests of the Service required the militarization of those employees. They continued to perform the same duties, and retained their Civil Service status and received Civil Service pay."

Comment: The Reserve of the Coast Guard was established by Public No. 8, 77th Congress, entitled,

"An Act to provide for the establishment, administration, and maintenance of a Coast Guard Auxiliary and a Coast Guard Reserve."

Section 207 of that Act, as amended by Public, Nos. 599, 762, and 773, 77th Congress, provides:

"'Sec. 207. The Commandant, with the approval of the Secretary of the Treasury or of the Secretary of the Navy, while the Coast Guard is operating as a part of the Navy, is hereby authorized to enroll as temporary members of the Reserve, for duty under such conditions as he may prescribe, including but not limited to part-time and intermittent active duty with or without pay, and without regard to age, members of the Auxiliary, such officers

and members of the crew of any motorboat or yacht placed at the disposal of the Coast Guard and such persons (including Government employees without pay other than the compensation of their civilian positions), who by reason of their special training and experience are deemed by the Commandant to be qualified for such duty, as are citizens of the United States or of its Terrorities or possessions, including the Philippine Islands to define their powers and duties, and to confer upon them, appropriate to their qualifications and experience, the same ranks, grades, and ratings as are provided for the personnel of the regular Coast Guard Reserve. When performing active duty with pay, as herein authorized, temporary members of the Reserve shall be entitled to receive the pay and allowances of their respective ranks, grades, or ratings, as may be authorized for members of the regular Coast Guard Reserve.'"

It is at once apparent that as to all such classes except (a) there is no question that they are not in what is ordinarily referred to as the "active military or naval service". For the purpose of benefits in the system stemming from Public No. 2, 73d Congress, including pensions, compensation, medical, hospital and domiciliary care, burial, vocational rehabilitation, loan guaranty or insurance, employment, readjustment allowances, and similar benefits, such service is defined as follows:

"II. The term 'military or naval forces' shall mean the Army, the Navy, the Marine Corps, the Coast Guard, the Naval Reserves, the National Naval Volunteers, and all other branches of the United States service while serving pursuant to law with the Army or Navy.

"III. The term 'person who served' shall mean a person, whether male or female and whether commissioned, enlisted, enrolled or drafted, who was finally accepted for active service in the military or naval forces of the United States, members of training camps authorized by law, and such other persons heretofore recognized by statute as having a pensionable status." (Veterans Regulation No. 10.) (Amendments to paragraph III by section 10, Public No. 144, 78th Congress, and by Public No. 301, 79th Congress, not material to the issue here involved.)

For insurance purposes section 601 (c) of the National Service Life Insurance Act, provides:

"(c) The term 'active service' means active service in the land or naval forces (including the Coast Guard) of the United States and service in the land or naval forces of the United States under the Selective Training and Service Act of 1940, but the service of any person ordered to active duty in any such force for a period of thirty days or less, shall not be deemed to be active service in

such force during such period;" (Amendments to section 601 (c) by section 10, Public No. 144, 78th Congress, and Public No. 301, 79th Congress, not material to the issue here involved.)

As to Class (a) it is clear they are in the active naval (Coast Guard) service unless, as the Congress has the power to do, they have been excepted by statute.

In connection with the question of the status of the temporary members of the Reserve under Selective Service, section 208, Public No. 8, 77th Congress, provides:

"Sec. 208. Members of the Reserve, other than temporary members as provided for in section 207 hereof, shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, and no member of the Reserve, other than temporary members thereof, shall be a member of any other naval or military organization except the Auxiliary or the Coast Guard as provided for in sections 214 and 215 of this title: Provided, That temporary members of the Reserve who may be members of any other military reserve, if ordered to active duty therein, shall be forthwith released from all active duty with the Coast Guard, and their status as temporary members of the Reserve terminated."

Examination of section 5 (a) of the Selective Training and Service Act of 1940 (Public, No. 783, 76th Congress, as amended), listing those exempted from registration and liability for training and service thereunder, would seem to require the conclusion that as *all* temporary members of the Reserve were not exempt from "registration and liability for training and service", and that those who were members of any other military reserve "if ordered to active duty therein, shall be forthwith released from *all active duty* with the Coast Guard, and their status as temporary members of the Reserve terminated." [Italics supplied.] It was the intent of the Congress that such temporary Reserve was not to have a status identical with that of those organizations of the military establishment whose members were exempted from registration, training and service.

There having been called to attention the fact that as to group (a), it had been held by the Judge Advocate General of the Navy that temporary members of the reserve had veteran status under the Civil Service laws, and that, in other opinions, it had been held that such force constituted a part of the forces "in active service", copies of these opinions were secured to ascertain whether the legal principles therein applied were persuasive to the view that such temporary members of the Coast Guard Reserve were within the purview of the laws governing the Veterans Administration. Examination thereof shows the following:

In an opinion dated April 11, 1944, on the eligibility of temporary members of the Coast Guard Reserve to receive mustering-out pay, under Public, No. 225, 78th Congress, it was stated:

"* * * Since temporary members of the Coast Guard Reserve are not in terms excepted from the cited statute as being ineligible to receive the benefits therein prescribed, it would appear that they are entitled to said benefits unless otherwise precluded therefrom. * * *"

The opinion then goes on to point out that approximately 70,000 persons enrolled as temporary members of the Coast Guard Reserve, for full-time, part-time or intermittent active duty, with or without pay, including Government employees without pay other than compensation for their civilian positions, being enrolled under formal contracts for the duration of the war, unless sooner terminated by the Coast Guard, in the six classifications mentioned in the letter from the Acting Commandant of the United States Coast Guard of October 26, 1945, as quoted above; that classifications (b) to (f), inclusive, do not receive military pay or allowance other than uniform allowances; that such members retain civilian positions held at the time of enrollment and work at them for full pay either while performing their duties or when not performing duty. As to the groups falling within subparagraphs (b) to (f), inclusive, who serve without pay, the opinion concludes that as mustering-out pay constitutes—

41 "* * * *pay*, which is additional to the pay to which the veteran was entitled at the time of his discharge or relief from active service. * * *"

it cannot be paid. This opinion, which is not based on the status, duties, etc., of temporary members, is of no persuasive force in the present question.

An opinion of July 15, 1944, dealt with the status of temporary members under sections 203 and 302 of Public, No. 277, 78th Congress, which provided for the printing and distribution of post cards to be used as applications for ballots, registration, etc. Section 302 defined those to whom the Act applied and included members "of the armed forces" of the United States. The specific question was whether temporary members of the Coast Guard Reserve came within the specific phrase.

The opinion holds that as members of the Coast Guard Reserve, temporary, are subject to the laws and regulations for the government of the Navy, they are members of the armed forces and within the purview of Public, No. 277. This opinion, likewise, is not believed to be authority as regards the question of entitlement under the laws governing the Veterans Administration, which are provided for on the basis of active service, etc.

In an opinion of the Acting Judge Advocate General of the Navy of September 16, 1944, on the question as to "veteran's status" of temporary members of the Reserve, there was cited an opinion of the United States District Court for the Eastern District of Pennsylvania (in re petition of James H. Brown, boatswain's mate, first class, U. S. Coast Guard Reserve (Temporary) for the writ of Habeas Corpus vs. John J. Cain, Warden of the Prison of Delaware County, Pennsylvania), decided in June 1944, in which the court held, in part, as follows:

" 'The relator has been since December 21, 1942, an enrolled temporary member of the Coast Guard Reserve, with the rating of Boatswain's Mate, First Class. *As such he was a member of the armed forces of the United States.*' " [Italics supplied.]

There is cited in the opinion the fact that the Veterans Administration has held that temporary members of the Reserve may not receive the benefits of National Service Life Insurance and that such reservists when killed or injured in line of duty are entitled only to the benefits prescribed by law for civilian employees of the United States. The opinion then concludes:

"7. It would therefore appear that for certain purposes and under certain circumstances members of the Coast Guard Reserve (Temporary) are considered members of the armed forces of the United States, though in a limited status, and are not entitled to all the rights and benefits accruing to members and veterans of the armed services.

"8. In view of the foregoing, I am of the opinion that only those members of the U. S. Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who by reason thereof are eligible upon separation from the service to mustering-out payments under Public Law 225—78th Congress (Mustering-Out Payment Act of 1944) should be considered as naval veterans."

42 The statement made by the Judge Advocate General of the Navy that the definition of the term "active service" for one purpose would not be controlling (as a matter of fact it may not even be persuasive) on any question which would involve the interpretation of these words under any other law, is concurred in.

The term "active service" under the laws governing the Veterans Administration, has been consistently defined by the Veterans Administration as applying to those in the active military or naval service as such, and not as a quasi-military or civilian adjunct thereto.

In letter dated October 24, 1942, to the Commandant, United States Coast Guard, it was stated, in part:

"Further reference is made to your letter requesting to be advised as to the effect on the payment of veterans' benefits or retired

pay of persons (1) who enroll in the Coast Guard Reserve as temporary officers or enlisted men, pursuant to Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as such section was amended by Public Law No. 599, 77th Congress, approved June 6, 1942, where no Coast Guard pay and allowances are involved, (2) who enroll in the Coast Guard Reserve as temporary officers or enlisted men with pay and allowances of their rank or rating, and (3) whether the situation would be different in any case under (2) if the enrollee would agree to waive the receipt of any such veterans' benefits or retired pay for the period of his Coast Guard service.

"In my letter to you of August 3, 1942, referred to in your present inquiry, it was stated, in part, that it was reasonable to conclude that the status of temporary officers and enlisted men in the Coast Guard Reserve is not that of a person in the active service in the military or naval forces (including the Coast Guard) of the United States, and that I was constrained to advise that such persons were not eligible for National Service Life Insurance. For the same reasons which influenced this decision I am of the opinion that such temporary officers and enlisted men in the Coast Guard Reserve are not in the active service of the Navy, including the Coast Guard, within the purview of the statutes and regulations which would prohibit the payment of veterans' benefits or retired pay to persons in receipt of active service pay. * * *"

In XC–3,132,330, 77 Sol. 183, there was considered on November 24, 1944, the question as to the validity of an application for National Service Life Insurance executed by the applicant when enrolled as a temporary member of the United States Coast Guard Reserve, the application having been executed after he was placed on active duty with full pay.

The opinion called attention to advice previously given the Commandant of the United States Coast Guard, that temporary members of the Reserve do not have the status of persons in the active service in the naval forces and held—

"* * * As the application of February 26, 1942, was made while the applicant was a member of the temporary reserve, its rejection was proper, * * *"

43 The status of temporary members of the Reserve of the Coast Guard, under the laws governing the Veterans' Administration, parallels that of the Women's Army Auxiliary Corps under such laws. In discussion the question whether a veteran's widow would be precluded from receiving concurrently death pension (as a widow) and pay as a member of the Women's Army Auxiliary Corps because of the statutory provision that—

"No pension shall be allowed or paid to any officer, noncommissioned officer, or private in the Army, Navy, or Marine Corps

of the United States, either on the active or retired list." (38 U. S. C. 26; Stat. 1082.)

In XC–2,969,369, 63 Sol. 598 [Administrator's Decision No. 502], it was stated:

"* * * Without commitment as to whether any statute, or other law, would preclude payment of pension to a widow in the active military service, the instant case may be disposed of by determination that the enrollment of the veteran's widow as a private in the Women's Army Auxiliary Corps does not constitute active military service. The status of members of the Women's Army Auxiliary Corps is similar in some respects to officers and enlisted men of the Army. Section 13 of Public No. 554, 77th Congress, approved May 14, 1942, creating the Women's Army Auxiliary Corps, provides that the Corps shall be administered by the Secretary of War through the channels of command of the Army pursuant to such regulations as the Secretary may promulgate and that the Secretary is authorized to prepare and issue any and all regulations, rules or orders and to employ any and all of the facilities of the War Department and of the Army of the United States to carry into effect the provisions of that Act.

* * * * *

"Moreover, the provisions of Sections 11 and 12 of the Act show that it was not the intent of Congress to incorporate the Women's Army Auxiliary Corps into the Army of the United States but that it was intended that the Corps should serve as an auxiliary with the Army. Section 11 provides, in part, in case of the injury or death of any member of the Corps incurred in active service in the Corps, for the payment to the member or her beneficiary of all benefits prescribed by law for 'civilian employees' of the United States who are physically injured while in performance of duty or who die as a result thereof. This section also provides that the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the cases of 'other civilian employees of the United States' so injured or otherwise incapacitated. It is further stated in the same section that employees' compensation under that Act shall not be paid concurrently with active duty pay or pension based upon active service. * * *"

It was thereupon concluded that service in the Women's Army Auxiliary Corps was not "active service" within the meaning of the 1891 Act, supra, and therefore that the widow, not being in receipt of active service pay, was not precluded from receiving, concurrently, both pension as a widow and pay as a member of the Women's Army Auxiliary Corps.

44 Another opinion dated November 28, 1944, approved November 29, 1944, held that service in the Women's Army

Auxiliary Corps was not active service within the contemplation of Public, No. 346, 78th Congress.

As to temporary members of the Coast Guard Reserve, section 211, Public, No. 8, 77th Congress, provides:

"Members of the Reserve, other than temporary members thereof, who suffer sickness, disease, disability, or death in line of duty shall be entitled to the same benefits as are or may hereafter be prescribed by law for members of the Naval Reserve who suffer sickness, disease, disability, or death under similar conditions."

Section 212 of the same Act, provides:

"When any temporary member of the Reserve is physically injured in line of duty while performing active Coast Guard service, or dies as a result of such physical injury, he or his beneficiary shall be entitled to all the benefits prescribed by law for civil employees of the United States, and the United States Employees' Compensation Commission shall have jurisdiction in such cases and shall perform the same duties with reference thereto as in the case of civil employees of the United States. Temporary members of the Reserve who contract sickness or disease while performing active duty shall be entitled to the same hospital treatment as is afforded members of the regular Coast Guard."

Section 212 (a), (added by Public, No. 447, 78th Congress), provides:

"'Sec. 212. (a) In case of physical injury or death resulting from physical injury—

"'(1) to any temporary member of the Reserve when incurred after February 19, 1941, in line of duty as a member of the Reserve, while on active duty or engaged in authorized travel to or from such duty; or

"'(2) to any member of the Auxiliary not on active duty as a member of the military or naval forces, when incurred after February 19, 1941, while on Coast Guard patrol pursuant to the request of competent Coast Guard authority, and which would have been incurred in line of duty in the active service had he been a member of the Reserve acting under competent orders; the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (5 U. S. C., ch. 15), as amended, subject to the other subsections of this section, shall apply, and such Act shall be administered by the United States Employees' Compensation Commission (hereinafter called the Commission) in the same manner and to the same extent as if such person were a civil employee of the United States and were injured while in the performance of his duty: Provided, That for benefit computation, regardless of

pay or pay status, such person shall be deemed to have had monthly pay of $150.'"

45 In Report No. 1093 (Senate 78th Congress, 2nd Session), accompanying H. R. 3704, the Bill enacted as Public No. 447, 78th Congress, it was stated apropos benefits under the Bill that:

"It will be noted from the forgoing schedule of benefits that these, in general, would conform to the benefits provided under laws administered by the Veterans' Administration and, like those laws, would be afforded without regard to the pay status or rank of the individual concerned."

A number of Bills have been introduced in the present Congress for the express purpose of granting a status to temporary members of the Reserve under the laws governing the Veterans' Administration. A report to the Director, Bureau of the Budget, on one of these, S. 1465—

"'A Bill Extending certain recognition and rights to temporary members of the United States Coast Guard Reserve, including the Voluntary Port Security Force, and members of the Coast Guard Auxiliary,'" on November 30, 1945, reads in part:

"The purpose of the bill is to grant disability and death compensation, pensions, allowances, and other benefits to temporary members of the Coast Guard Reserve and members of the Coast Guard Auxiliary who suffer physical injury or death resulting from physical injury incurred after February 19, 1941 in the performance of certain duties for which the benefits provided by the United States Employees' Compensation Act of September 7, 1916, as amended, are now provided, by considering the injury thus sustained as having been incurred by any such member in line of duty as a member of the Regular Coast Guard. The bill further provides for the furnishing of a certificate of honorable service or an honorable discharge under certain conditions and extension of the benefits of the Veterans' Preference Act of 1944 to persons who have performed certain services and received a certificate in evidence thereof.

* * * * *

"Under Section 211, Act of February 19, 1941, members of the Reserve other than temporary members thereof who suffer sickness, disease, disability or death in line of duty are entitled to the same benefits as those now or hereafter prescribed by law for members of the Naval Reserve under Public Law 775, 76th Congress, August 27, 1940, as amended (34 U. S. C. 855 c–1–2) who suffer sickness, disease, disability or death under similar circumstances. Temporary members of the Reserve, on the other hand, are not entitled to such benefits, but are eligible, in case of physical injury or death resulting from physical injury incurred after February 19, 1941 in line of duty as a member of the Reserve while

on active duty or engaged in authorized travel to or from such duty to the benefits provided civilian employees of the United States under the United States Employees' Compensation Act, as amended; and for benefit computation, regardless of pay or pay status are deemed to have had monthly pay of $150.

"It has long been the policy of the Congress to restrict veterans' benefits, as such, to persons who served in active military or naval service, and it is the view of the Veterans' Administration that the basic requirement of active military or naval service as a
46 prerequisite to entitlement to such benefits under laws administered by the Veterans' Administration is fundamentally sound. Service such as that rendered by temporary members of the Coast Guard Reserve and members of the Coast Guard Auxiliary is recognized as essentially civilian service and provision is made for such members through extension to them of the benefits provided for civilian employees of the United States and certain civilian groups subjected to war hazards, under the United States Employment Compensation Act, as amended."

As alreday shown above, it has been the consistent view of the Veterans' Administration that where the organic Act restricts the potential right of a beneficiary thereunder to benefits "prescribed by law for civil employees of the United States" as does section 212, Public No. 8, 77th Congress, as amended, any person whose rights are governed by such Act is not entitled to pension benefits under the laws governing the Veterans' Administration in the absence of specific legislation extending benefits to them. This was one of the premises resulting in the conclusion that the Women's Army Auxiliary Corps was not within the purview of any of such laws until Public No. 10, 78th Congress, specifically extended hospitalization, domiciliary care and burial benefits to such Corps.

It is also to be noted that in 77 Sol. 183, the words "active service" as used in section 601 (c) of the National Service Life Insurance Act were defined as not including a temporary member of the Coast Guard Reserve, even though on active, full-time duty with pay. (Group (a).)

HELD: Temporary members of the Coast Guard Reserve are not within the purview of the laws governing the Veterans' Administration for pensions, National Service Life Insurance or medical and hospital services as beneficiaries of the Veterans' Administration. (Opinion of the Solicitor, Veterans' Administration, dated March 15, 1946.)

This decision is hereby promulgated for observance by all officers and employees of the Veterans' Administration.

Omar N. Bradley,
OMAR N. BRADLEY,
General, U. S. Army,
Administrator of Veterans' Affairs.

47 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]

Affidavit of F. A. Crisp

F. A. Crisp being duly sworn deposes and says:

I, F. A. Crisp, in the Office of the Secretary of the Navy, have knowledge of the facts hereinafter set out, and I am authorized to make the following averments:

I make this affidavit to supplement the affidavit of Lawson A. Moyer the Executive Director and Chief Examiner of the United States Civil Service Commission, submitted in support of defendants' motion for summary judgment and in opposition to plaintiff's motion.

Mr. Moyer's affidavit does not completely set out the chain of events leading up to the letter from the Acting Secretary of the Navy to the United States Civil Service Commission dated October 9, 1944, which is set out as Exhibit 2 of defendants' moving papers. The matter in issue was brought to the attention of the Acting Secretary of the Navy by the Director of Shore Establishments and Civilian Personnel, Navy Department, by a memorandum dated 22 August 1944, which was referred by the Acting Secretary of the Navy to the Judge Advocate General, Navy Department, who returned it under date of September 16, 1944, with an opinion endorsed thereon.

48 Attached hereto is a photostatic copy of a certified copy of said memorandum and endorsement of opinion, which are true copies of official documents on file in the Navy Department.

The original of those documents were received by the Acting Secretary of the Navy and were the basis of his letter to the United States Civil Service Commission dated October 9, 1944, which is shown as Exhibit 2 of the moving papers.

The position taken by the Acting Secretary of the Navy was promulgated throughout the Navy Department, put into effect, and at the time of the disenrollment of the plaintiff in this action was shown as standing instructions known as Instruction No. 120 of the Navy Civilian Personnel Instructions (NOPI–120.1–1, 15 June 1945), a true copy of which is also attached to this affidavit.

F. A. Crisp.

Sworn to before me this 15 day of October 1946.

K. M. McManes,
Captain, U. S. Navy.

Copy received: John L. Burling. Oct. 16, 1946.

50 *Exhibit "B"*

SECP-290: wh.

22 AUGUST 1944.

Memorandum

To: Acting Secretary of the Navy.
Subj: Coast Guard Reserve Tempo. .ry—Veteran Status of.

1. The Civil Service Commission has informed this office that the Commandant, U. S. Coast Guard, has ruled that members of the Coast Guard Reserve Temporary are members of the Armed Forces. As a result, the Civil Service Commission has been forced to extend veterans' preference to honorably discharged members of that group.

2. The Chief of the Veterans Section, National Headquarters, Selective Service System; the Civil Service Commission and various veteran organizations are strongly opposed to giving this group veteran status.

3. Representatives of various veterans' organizations attended a conference at the Civil Service Commission on 16 August 1944 for the purpose of determining what action should be taken in this matter. This matter is to be part of the agenda at the various conventions of Veterans Organizations to be held in the near future.

4. The Coast Guard Reserve Temporary includes such classes of persons as the following:

(a) Pilots.

(b) Owners, regular officers, and members of the crew of motorboats or yachts placed at the disposal of the Coast Guard.

(c) Plant guards.

Members of this group are on duty for intermittent periods. They may serve with or without pay. They serve for a definite period of days, for a week or for a month. The period of active duty is controlled by their agreement with the Coast Guard. They cannot be called to duty for a period which exceeds the period set forth in their agreement.

5. Reports reaching this office indicate that as soon as the ruling of the Civil Service Commission was promulgated, many government employees have enrolled with this group.

6. The arguments in favor of declaring this group to be part of the Armed Forces are as follows:

(a) The Coast Guard Auxiliary and Reserve Act of 1941 which creates the Reserve and the Temporary Reserve establishes
51 the Reserve as part of the Armed Forces. It might be argued that the Temporary Reserve is part of the Reserve and therefore, also, part of the Armed Forces.

(b) Members of the Temporary Reserve while on active duty are subject to military discipline and punishment.

(c) At the outbreak of the present war, members of the Temporary Reserve patrolled off our coasts and were subject to combat.

(d) The U. S. Government would probably contend if any of this group were captured while on active duty that they were entitled to the status of prisoners of war and not that of civilians.

7. However, it is the opinion of this office that members of the Coast Guard Reserve Temporary are not part of the Armed Forces and therefore are not entitled as a group to veteran status. This opinion is based upon the following reasons:

(a) The Coast Guard Auxiliary and Reserve Act of 1941 indicates that Congress intended the Temporary Reserve to be considered as something different than the regular reserve.

(b) Members of this group may retain their civilian employment and pay while in the Temporary Reserve.

(c) Members of this group must register for Selective Service purposes and are subject to induction into the Armed Forces.

(d) Many members of this group receive no military pay while on duty but are paid by their civilian employers.

(e) Members of this group do not receive the benefits of National Life Insurance.

(f) Members of this group may be members of other Naval or Military organizations.

(g) Members of the Temporary Reserve cannot be compelled to serve for a period in excess of the period set forth in their enlistment.

(h) Members of this group when killed or injured in the line of duty are entitled only to the benefits prescribed by law for civilian employees of the United States.

8. If veteran status is given to the Coast Guard Reserve Temporary, the following problems among others will arise:

(a) Many civilians, especially Federal Employees, will attempt to enlist with this group in order to secure veteran
52 status. They will be able to stay home with their families, draw their civilian war time pay and still get veterans status.

(b) The Coast Guard Temporary Reservist who has been discharged will be in a better position than the one not discharged since veterans preference requires that the one claiming it, must have an honorable discharge from the Armed Forces.

9. This matter is brought to the attention of the Secretary because it is believed that the best interests of the Navy are not being served by the present classification of these reservists as veterans.

F. G. CRISP.

53 *Exhibit "C"*

JAG:II:JAL:amp.

Second Endorsement on Memo. SECP-290; wh of 22 August 1944, to Acting SecNav.

16 SEP. 1944.

To: Secretary of the Navy.
Subject: Coast Guard Reserve Temporary—Veteran status of.

1. Returned.

2. By statute, the Coast Guard Reserve consists of two classes, regular and temporary (14 U. S. C. Supp. III, 301) and is declared to be a military organization (14 U. S. C. Supp. III, 304). It is a "component part of the Coast Guard" (14 U. S. C. Supp. 302), though most of its members (temporary) have been held to be not entitled to mustering-out payments under the Act of February 3, 1944 (JAG:II:WJG:z; L16-4/ET14; 11 Apr. 1944). The Secretary of the Navy on 15 July 1944 held that "members of the Coast Guard Reserve (temporary) are members of the armed forces of the United States" within the meaning of Public Law 277, 78th Congress (Servicemen's Voting Law) and under date of 7 February 1944, the Acting Secretary of the Navy, in a letter addressed to the Commissioner of Immigration and Naturalization, after considering many of the arguments advanced in paragraph 7 of basic memorandum, ruled that temporary members of the Coast Guard Reserve "are considered to be members of a 'naval or military organization'" so as to render them eligible for expeditious naturalization under the provisions of the Nationality Act of 1940.

3. In an opinion of the U. S. District Court for the Eastern District of Pennsylvania (In re Petition of James H. Brown, boatswain's mate, first class, U. S. Coast Guard Reserve (Temporary) for the writ of Habeas Corpus vs. John J. Cain, Warden of the Prison of Delaware County, Pennsylvania), decided in June 1944, the court held in part, as follows:

"The relator has been since December 21, 1942 an enrolled temporary member of the Coast Guard Reserve, with the rating of Boatswain's Mate, First Class. *As such he was a member of the armed forces of the United States.*" [Italics supplied.]

4. It is understood that approximately 70,000 persons are enrolled as temporary members of the Coast Guard Reserve pursuant to Section 207 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended (14 U. S. C. Supp. II, 307) and serve full time, or part time intermittent active duty, with or without
54 pay. Pursuant to the above Act, temporary members of the Reserve have been enrolled under formal contracts for the

duration of the war, unless terminated sooner by the Coast Guard, in several different classifications do not receive military pay or allowances, other than uniform allowances, and continue to hold the same civilian positions held at the time of their enrollment and "work at them for full pay either at the same time that they are performing their military duties, or at times when, they are not performing military duties." (Ltr. Cdt. USCG to SecNav 28 Feb. 1944, file CG–784.) Members of such classifications serve only a minimum of 12 hours per week and are not subject to transfer without their consent.

5. The liability of members of the Coast Guard Reserve (Temporary) to the Selective Training and Service Act of 1940, as amended, is stated by that law to be that—

"Members of the Reserve, *other than temporary members* [italics supplied] * * * shall receive the same exemption from registration and liability for training and service as members of the Naval Reserve, * * *". (14 U. S. C. Supp. 308.)

Members of the Coast Guard Reserve (Temporary) are subject to the laws, regulations and orders for the Coast Guard "when employed *on active duty* [italics supplied] * * * or while wearing a uniform prescribed for the Reserve." (14 U. S. C. Supp. 309.)

6. So far as benefits are concerned, the matter of insurance is under the jurisdiction of the Veterans' Administration which activity it is understood thas ruled that Temporary Coast Guard reservists may not receive the benefits of National Life Insurance. Such reservists, when killed or injured in line of duty, are entitled only to the benefits prescribed by law for civilian employees of the United States.

7. It should therefore appear that for certain purposes and under certain circumstances members of the Coast Guard Reserve (Temporary) are considered members of the armed forces of the United States, though in a limited status, and are not entitled to all the rights and benefits accruing to members and veterans of the armed services.

8. In view of the foregoing, I am of the opinion that only those members of the U. S. Coast Guard Reserve (Temporary) who perform full time active duty with military pay and allowances and who by reason thereof are eligible upon separation from the service to mustering-out payments under Public Law 225—78th Congress (Mustering-Out Payment Act of 1944) should be considered as naval veterans.

55 9. It is recommended that consideration be given by the Secretary of the Navy to the issuance of a directive prohibit-

ing further enrollments in the Coast Guard Reserve (Temporary) except for full time active duty with military pay and allowances.

F. L. LOWE,
Acting Judge Advocate General.

93 In The District Court of The United States
For The District of Columbia

Civil Action File No. 34267

JACK W. COHEN, PLAINTIFF
v.
HARRY B. MITCHELL, LUCILLE FOSTER MCMILLIN, ARTHUR S. FLEMMING, DEFENDANTS

Order

Filed Oct. 25, 1946

This cause came on to be heard on cross motions of plaintiff and of defendants for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the court having considered the pleadings and the affidavit of plaintiff Jack W. Cohen in support of his motion and the affidavits of F. A. Crisp, Chester A. Anderson, and Lawson A. Meyer in support of defendants' motion; and having heard oral argument; and having found that there is no genuine issue as to any material fact; and having concluded that plaintiff Jack W. Cohen is entitled to judgment as a matter of law, it is by the court this 25th day of October, 1946:

Adjudged and declared: That plaintiff, as a man who served on active duty, although temporary, intermittent, and without pay, in the United States Coast Guard Reserve during a portion of World War II and who has been honorably separated from the Coast Guard Reserve which was a portion or branch of the armed services of the United States, is entitled to the preference in employment created by the Veterans' Preference Act of 1944.

94 And it is further adjudged, ordered, and decreed: That defendants Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming shall forthwith classify plaintiff Jack W. Cohen as a preference eligible pursuant to the Veterans' Preference Act of 1944 (5 United States Code, Section 851 et seq.) and that said defendants having granted said preference to said plaintiff shall thereafter refrain from denying preference eligibility to

plaintiff or from in any manner taking any action which will deny to plaintiff such status.

T. ALAN GOLDSBOROUGH,
Justice.

Not objected to as to form.

JOHN F. SONNETT,
Assistant Attorney General.

96 In the District Court of the United States for the District of Columbia, Motions Court

Civil Action No. 34267

Civil Action No. 34268

[Title omitted.]

WASHINGTON, D. C., *October 17, 1946.*

The above-entitled causes came on for hearing on a motion for summary judgment before Hon. T. Alan Goldsborough, Associate Justice, at 2 o'clock p. m.

97 Appearances: On behalf of the plaintiffs: John Burling, Esq. On behalf of the defendants: Frank Hayden, Esq., Ralph B. Gregg, Esq., of the Indiana Bar, representing the American Legion. Arthur M. Gladstone, Esq., of the New York Bar, representing the Coast Guard League.

Conclusion of the court

(After oral argument)

The COURT. Gentlemen, I don't have any difficulty about this case at all. The statute is as follows and includes among those entitled to Federal Employment preference "those ex-service men and women who have served on active duty in any branch of the armed forces of the United States during any war or any campaign or expedition for which a campaign badge has been authorized, and have been separated therefrom under honorable conditions."

Now, of course, it is not contended that under the letter of what I have just read there can be any doubt that these petitioners are included, but the contention is made that the Court has the right by construction, to say that Congress could not have had in mind individuals of the class of these plaintiffs, because of the fact that in practice, while they could have been—after they
98 had once signed up—they could have been called into active and continuous service as a matter of practice they only served during certain hours of the night, retaining their civilian positions.

Now, what right have I to place such a construction upon the Act?

These men when they were called out were admittedly sailors, and during the time they were out—I used that expression "at night" in this service they were subject in every respect to the duties and obligations of being sailors—they were not "guerillas," they would have been entitled to the protection under international law that a sailor is entitled to.

Now, of course, when an Act of Congress is subject to construction or interpretation and the Court can give an interpretation which the Court feels is carrying out the real purpose of Congress, the Court has the right to interpret and construe it. There is no doubt whatever in the Court's mind that there is no room for construction in Section 4 of this Act providing for persons entitled to Federal Employment preference and that the claimants here come within the terms of that section, and the relief of summary judgment now requested by the plaintiffs will be granted.

99 REPORTER'S CERTIFICATE

I, O. H. Frost, one of the official reporters for the District Court of the United States for the District of Columbia, hereby certify that the foregoing is the official transcript of the Court's conclusions in the above-entitled causes.

O. H. Frost, *Official Reporter.*

100 In the District Court of the United States

Civil Action No. 34267

[Title omitted.]
[File endorsement omitted.]

Notice of Appeal

Filed Nov. 19, 1946

Notice is hereby given that Harry D. Mitchell, Lucille Foster MmMillin, and Arthur S. Flemming, the defendants above named, hereby appeal to the Court of Appeals for the District of Columbia from the order of injunction entered in this action on October 17, 1946.

Dated November 19, 1946

John F. Sonnett,
John F. Sonnett,
Assistant Attorney General.
George Morris Fay,
George Morris Fay,
United States Attorney,
Attorneys for the Defendants.

767175—47——4

Copies sent to: Gerhard Gesell, Union Trust Building. William Merrick Parker, Union Trust Building.

NOVEMBER — 1946.

103 In the District Court of the United States for the District of Columbia.

Civil Action File No. 34268

HARRY W. HUBICKEY, 323 S. 3rd STREET, COLWYN, PA., PLAINTIFF

v.

HARRY B. MITCHELL, 7TH AND F STREETS, NW., WASHINGTON, D. C.; LUCILLE FOSTER MCMILLIN, 7TH AND F STREETS, NW., WASHINGTON, D. C., ARTHUR S. FLEMMING, 7TH AND F STREETS, NW., WASHINGTON, D. C., DEFENDANTS

Complaint for injunction and declaratory relief

Filed April 12, 1946

To the Honorable Justices of the District Court of the United States for the District of Columbia:

1. Jurisdiction founded on the existence of a federal question. This action involves the Veterans' Preference Act of 1944, 58 Stat. 387; U. S. C. Title 5, § 851, as hereinafter more fully appears.

2. Plaintiff is a citizen of the United States, residing at 323 S. 3rd Street, Colwyn, Pennsylvania.

104 3. Defendants are the members of the United States Civil Service Commission, and are sued both in their official and individual capacity. All of the defendants maintain their official residence within the District of Columbia. Defendants are charged with responsibility for the administration and enforcement of the provisions of the Veterans' Preference Act of 1944.

4. Defendants have refused to grant plaintiff the status of a preference eligible to which he is lawfully entitled as an ex-serviceman under the provisions of Sections 2 and 18 of the Veterans' Preference Act of 1944.

5. Plaintiff served on active duty as a member of the United States Coast Guard Reserve (Temporary), a branch of the armed forces of the United States during World War II, and was separated therefrom on September 30, 1945, under honorable conditions. The United States Coast Guard Reserve (Temporary) was created and functioned in accordance with the Coast Guard Auxiliary and Reserve Act of 1941, 55 Stat. 11, U. S. C., Title 14, § 301. Plaintiff enrolled as a member of the Coast Guard Reserve

(Temporary) on October 18, 1944, with the rank of Seaman First Class, at which time he executed a form entitled "Temporary Member of the Coast Guard Reserve—Enrollment and Active Duty Assignment," a true copy of said form being attached hereto and marked "Plaintiff's Exhibit One." Plaintiff continued to serve as a member of such Reserve on a part-time active duty assignment, without compensation, until September 30, 1945, at which time he was honorably disenrolled with the rank of Seaman First Class and presented with a "Certificate of Disenrollment," a true copy of said certificate being attached hereto and marked "Plain-
105 tiff's Exhibit Two."

Plaintiff was issued necessary uniform and equipment and received food and quarters while on active duty. At all times while on active duty, either traveling to or from such duty, or when wearing the uniform prescribed, plaintiff was subject to the laws, regulations, and orders for the government of the Coast Guard and was subject to disciplinary action for any offense committed thereunder.

6. Subsequent to his honorable disenrollment from active duty in the United States Coast Guard Reserve (Temporary), plaintiff applied to the United States Civil Service Commission for recognition as a preference eligible under the provisions of the Veterans' Preference Act of 1944, in accordance with the regulations and procedures of the Civil Service Commission on its prescribed Form 14, entitled "Veteran Preference Claim." Plaintiff was notified by the Civil Service Commission that his claim had been rejected for the reason that his service was for part-time or intermittent duty without pay or allowances other than for uniforms. A true copy of this rejection, Civil Service Form 3593, is attached hereto and marked "Plaintiff's Exhibit Three."

7. Plaintiff has been employed as a Naval Architect, Navy Department, for a period of six years. On March 28, 1946, plaintiff was notified that he would be separated from this service on April 26, 1946, because of a reduction in force. A true copy of this Notice of Reduction in Force is attached hereto and marked "Plaintiff's Exhibit Four."

The refusal of defendants to grant plaintiff the status of a preference eligible adversely and directly affects plaintiff's op-
106 portunity to continue in government employment. Unless plaintiff is granted the status of a preference eligible, he will suffer irreparable damage through the loss of his position with the United States Government. Plaintiff has pursued whatever administrative remedies are available to him in seeking to obtain a determination of his eligibility for status as a preference eligible, and is without other remedy than this action in seeking to have his rights in this regard determined.

8. On April 4, 1944, prior to the enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued Circular Letter No. 4145 to Regional Directors and Division Chiefs of the Commission, providing as follows:

C4145–1

"UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C.

April 4, 1944.
XE:P:S

"Circular Letter No. 4145 (Manual of Instructions)

Subject: Veteran Preference—United States Coast Guard Reserve.

Regional Directors, and Division Chiefs:

"The following information and instructions are forwarded for your attention and guidance, regarding the present active duty status of members of the United States Coast Guard Reserve.

"1. Active duty performed by members of the United States Coast Guard Reserve since February 19, 1941, the date of the approval of Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, is considered regular active duty as distinguished from training duty. Certificates of discharge from the United States Coast Guard Reserve showing (1) any active duty since Febuary 19, 1941, and (2) honorable or satisfactory separation therefrom are acceptable as proof for preference and such certificates need not be referred to the central office.

"2. Public Law 8, 77th Congress, The Coast Guard Auxiliary and Reserve Act of 1941, made provisions for the en-
107 rollment of persons as temporary reservists. During the present war, active duty performed by the temporary members of the Coast Guard Reserve, whether full-time, part-time, or intermittently, either with or without pay, including government employees enrolled without pay other than the compensation of their civilian positions, constitutes active service as distinguished from training duty. Membership in the Coast Guard Auxiliary, a nonmilitary organization, does not constitute membership in the armed forces. Many auxiliarists, however, are also enrolled as temporary members of the Coast Guard Reserve, and, in such cases, if they perform active duty, they are in the armed forces. Preference benefits are applicable to the temporary reservists who furnish proof of (1) active duty whether full-time, part-time, etc., and (2) honorable or satisfactory separation which may be by release, discharge, or disenrollment. Such cases need not be forwarded to the central office, unless doubtful in any important particular.

"3. Questions concerning this Circular Letter should be referred to the Preference Sub-Unit, Services Section, Examination & Personnel Utilization Division.

"By direction of the Commission:

L. A. MOYER,
Executive Director."

9. Sometime in August 1944, following enactment of the Veterans' Preference Act of 1944, the United States Civil Service Commission issued a pamphlet entitled "From Military Service to Civil Service, Answers to Questions of Returning Servicemen and Servicewomen about Federal Employment," which stated that members of the Coast Guard Reserve (Temporary) who had been discharged under honorable conditions were considered members of the armed forces and as such entitled to the status of preference eligible.

10. On November 4, 1944, the United States Civil Service Commission issued the following circular:

"D508–1

"UNITED STATES CIVIL SERVICE COMMISSION

WASHINGTON, D. C.

NOVEMBER 4, 1944.
XE: HAP: kds

"Departmental Circular No. 508

108 "Subject: Status of Members of the U. S. Coast Guard Reserve (Temporary) with Regard to Veteran Preference.

"*To Heads of Departments and Independent Establishments:*

"Members of the Coast Guard Reserve (Temporary) have been enrolled according to the following classifications:

(a) For active full-time duty with pay and allowances at shore stations or on Coast Guard vessels.

(b) For part-time or intermittent duty without pay and allowances other than for uniforms.

(c) Pilots without pay and allowances other than for uniforms.

(d) Officers of Great Lakes vessels without pay and allowances other than for uniforms.

(e) Coast Guard police without pay and allowances.

(f) Civil-service employees of the Coast Guard without pay other than compensation of their civilian positions.

"The Acting Secretary of the Navy has advised the Commission that only those members of the Coast Guard Reserve (Temporary) falling in classification (a) above, should be considered as naval veterans upon discharge.

"In view of the ruling of the Acting Secretary of the Navy, service in the Coast Guard Reserve (Temporary) may be used as a basis for the granting of veteran preference under the Veterans' Preference Act of 1944 only if such service was in classification (a), above, and other conditions necessary to the granting of veteran preference are present.

"The provisions of this circular are effective with respect to preference claims which have been granted, to pending claims, and to future claims.

"Questions concerning this circular may be addressed to the Civil Service Representative assigned to the Agency's Washington field offices, or to the Examining and Personnel Utilization Division, Preference Sub-Unit, telephone extension 457 (Commission's Central Office), or to the appropriate regional or branch regional office of the Commission.

"By direction of the Commission:

Very respectfully,

L. A. MOYER,
Executive Director and Chief Examiner.

109 11. Defendants are without legal authority or discretion to make or enforce any rule or regulation which denies to plaintiff the status of a preference eligible under the Veterans' Preference Act of 1944. Defendants have acted contrary to the express terms and requirements of that Act in denying plaintiff such status. The action of the defendants in this regard is wholly arbitrary and discriminatory, depriving plaintiff of the rights and privileges conferred upon him by such Act to his immediate and continuing detriment.

Wherefore plaintiff demands judgment as follows:

1. That this court order defendants to classify plaintiff as a preference eligible under the Veterans' Preference Act of 1944, and thereafter to refrain from taking any action which will deny plaintiff such status.

2. That this court adjudge and declare that plaintiff, as a member of the United States Coast Guard Reserve (Temporary) who served during World War II and was separated therefrom under honorable conditions, is entitled to the status of a preference eligible under the provisions of the Veterans' Preference Act of 1944.

3. That plaintiff recover his costs.

4. That plaintiff have such other and further relief as is just.

GERHARD A. GESELL,
Attorney for Plaintiff.
COVINGTON, BURLING, RUBLEE,
ACHESON & SHORB,
701 Union Trust Building, Washington, D. C.

110 *Exhibit One*

TEMPORARY MEMBER OF COAST GUARD RESERVE

ENROLLMENT AND ACTIVE DUTY ASSIGNMENT

From Office of District Coast Guard Officer:

Naval District _____ City _____ State _____ Date _____.

To _____ Rank or Rating _____

1. In accordance with the provisions of the Coast Guard Auxiliary and Reserve Act of 1941, as amended, and Coast Guard Reserve Regulations as amended, and subject to your acceptance and execution of the prescribed oath of office or oath of allegiance, you are hereby enrolled as a temporary member of the United States Coast Guard Reserve, with the rank or rating indicated above, USCGR, class T, from date of oath.

2. The period of your enrollment shall be for the duration of the war upon the completion of which you will be disenrolled unless the period of your enrollment is sooner terminated by Coast Guard authority.

3. You will perform such duties as may be prescribed from time to time by Coast Guard authority in the classification checked below:

1. ☐ Auxiliary members enrolled in class T.
2. ☐ Volunteer Port Security Force.
3. ☐ Enrolled for other volunteer duty, namely_____
4. ☐ Pilots.
5. ☐ Coast Guard Civil Service Employees.
6. ☐ Officers of Great Lakes Vessels.

You are authorized to wear the prescribed uniform only while on active duty and while en route to and from such duty. Members in classifications 1, 2, and 3 will be on active duty only as directed by competent authority for a minimum of 12 hours per week. They will not be subject to transfer without their consent. Members in classifications 4 and 5 will be on active duty and subject to call at all times. Members in classification 6 will be on active duty only during the open season of navigation on the Great Lakes.

4. Your military status as a member of the U. S. Coast Guard Reserve shall attach during periods when you are actually engaged on active duty or en route to and from such duty. In the performance of your duty as a temporary member of the United States Coast Guard Reserve, you are vested with the same power and authority as members of the regular Coast Guard of similar rank, grade, or rating. You shall be subject to the laws, regulations, and orders for the government of the Coast Guard and to disciplinary action for offenses committed while subject thereto, in accordance

with the provisions of Section 209 of the Coast Guard Auxiliary and Reserve Act of 1941, as amended.

5. You will serve without pay and allowances (other than compensation of their civilian positions in the case of Government employees), except (1) such travel and subsistence allowances as may be specifically authorized and (2) uniform allowances of:

---

6. You are not by reason of enrollment as a temporary member of the Reserve exempt from registration and liability for training and service under the Selective Training and Service Act.

7. You will be entitled to the following benefits and privileges only: (a) In the case of physical injury in line of duty while performing active Coast Guard service, or death as a result of such physical injury, the benefits prescribed by law for civil employees of the United States, as administered by the United States Employees' Compensation Commission, to the extent that the same may be applicable. (b) In the case of sickness or disease contracted while performing active duty, the same hospital (including medical, but excluding dental) treatment as is afforded members of the regular Coast Guard. (c) Such other benefits and privileges as may be specifically authorized from time to time for temporary members of the Reserve or classifications thereof by law or regulations.

8. You are hereby ordered, upon acceptance of this enrollment and execution of the prescribed oath, to commence active duty at:

In accordance with the above terms and conditions, effective

Accepted _____ Date _____ Enrolling Official (By Direction of the Commandant) _____.

Oath of Office (For Officers):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. SO HELP ME GOD. And I do further swear (or affirm) that I will use my best endeavors to prevent and detect frauds against the laws of the United States imposing duties upon imports. SO HELP ME GOD.

Subscribed and Sworn to before me this _____ day of _____, 19____.

_____ _____

(Signature and title) UNITED STATES COAST GUARD RESERVE (Temporary)

Oath of Allegiance (For Enlisted Men):

Having been enrolled as _____ (temporary) in the United States Coast Guard Reserve, I, _____ do solemnly swear (or affirm) that I will bear true faith and allegiance to the United of America, and that I will serve them honestly against all their enemies whosoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the laws and regulations for the government of the United States Coast Guard. Subscribed and sworn to before me this _____ day of _____ 19___.

_____ _____

(Signature and title)

UNITED STATES COAST GUARD RESERVE (Temporary)

112 *Exhibit Two—Back Page*

Enrolled as: Sea. 1/c. 6195-936. On 18 October 1944 at Philadelphia, Pa. Ratings held: Sea. 1/c. Training Course completed: Volunteer Training School. Served on active duty for a total of 32 days. Rating at release Sea. 1/c.

113 *Exhibit Three*

Members of the Coast Guard Reserve (Temporary) are considered as having performed active duty in the armed forces only when such duty is full-time active duty with pay and allowances. As your service was for part time or intermittent duty without pay and allowances, other than for uniforms, your claim for preference is disallowed. 34268.

5 April 1946.

Form 3953—October 1942.

Mr. HARRY N. HUBICKEY,
323 S. 3rd St., Colwyn, Pa.

The Commission regrets to inform you that your request for military preference benefits cannot be given favorable consideration for the reason checked below:

——Dishonorable discharge
——Separation not honorable
——No active Federal military or naval service
——Service in civilian capacity
——Service for training only
——Preference not applicable to children of veterans
——Divorced from veteran prior to his death
——Remarried after death of veteran
——Husband not disqualified by service-connected disability
——Husband not over 55 and disability not service-connected
——See note on other side

Please be assured that your application is receiving our most careful attention, although we are asking all applicants, in the interest of the War Program, to refrain from making inquiries concerning the status of pending applications, prospects of appointment and similar matters which tend to prevent concentration of our resources on recruiting and placement activities essential to the War Program.

LABOR BOARD,
Philadelphia Naval Shipyard, Phila., Pa.

Exhibit Two—Front Page

767175—47 (Face p. 54)

114 *Exhibit four*

P16–1 (5) 170

UNITED STATES NAVAL SHIPYARD
PHILADELPHIA 12, PA.

28 MARCH 1946.

To: Harry W. Hubickey, Check #031275, Naval Architect, P–3.
Via: Design Superintendent.
Subj: Notice of Reduction in Force.

1. The Commander regrets that it will be necessary to separate you from the service because of a reduction in force, made necessary by decrease of work. Your last day on the rolls will be 26 April 1946. If, at that time, you have additional annual leave to your credit, payment will be made for the entire unused portion in one lump sum with your next payment following that date.

2. Your services have been satisfactory and your selection for separation has been made in accordance with the Civil Service Commission's regulations governing reductions in force, which take into account the nature of your appointment, whether or not you are entitled to veteran preference, your efficiency rating, and your length of Federal service. If you wish to examine these regulations or to inspect the retention register and records, you should contact the Industrial Relations Division, Bldg. #698. If you are in doubt as to the basis on which this action is taken, or if you feel that an error has been made or that the regulations have been violated, you may discuss the matter with the Assistant Industrial Relations Officer.

3. If you feel that veteran preference rights, or rights under Civil Service Commission's Regulations have not been recognized in your case, you are requested to report in person, accompanied by a representative, if you desire, to the Industrial Relations Division, Bldg. #698, for an interview. If you feel that you have sufficient grounds for an appeal, after such interview, you will be furnished with a form to use in filing your appeal with the Director, 3rd U. S. Civil Service Region, Custom House, 2nd and Chestnut Streets, Phila., Pa.

4. According to our records you have no re-employment rights in any other Federal agency as a result of transfer to this agency, but if you believe you have these rights, you should apply to that agency within 40 days after the effective date of your separation from this activity.

5. If you have any problems incidental to the termination of your employment here, or if you have any questions regarding bond deductions, retirement deductions, etc., contact the Indus-

trial Relations Division for information. You should leave a forwarding address there if you intend to change your address.

By direction of the Comdr:

B. J. Kelley,
B. J. Kelley,
Industrial Relations Officer.

115 In the District Court of the United States
for the District of Columbia
Civil Action No. 34268

[Title omitted.]
[File endorsement omitted.]

Answer

Filed April 25, 1946

For answer to the complaint filed in this cause defendants state as follows:

FIRST DEFENSE

1. Defendants admit the allegations of paragraphs 1, 2, 3, 5, 6, 8, 9, and 10 of the complaint.

2. Answering paragraph 4 of the complaint, defendants admit that plaintiff was denied the status of a preference eligible, but aver that he was not entitled to such status under the provisions of the Veterans' Preference Act of 1944.

3. Answering paragraph 7 of the complaint, defendants admit the allegations thereof, except that defendants are without information or knowledge sufficient to form a belief as to whether plaintiff will suffer irreparable damage through the loss of his position with the United States Government.

4. Defendants deny the allegations of paragraph 11 of the complaint.

116 SECOND DEFENSE

5. Plaintiff's part-time service as a temporary member of the Coast Guard Reserve did not constitute him an ex-serviceman who had served on active duty in a branch of the armed forces of the United States within the meaning of Section 2 of the Veterans' Preference Act of 1944.

THIRD DEFENSE

6. The complaint fails to state a claim upon which relief can be granted.

Wherefore, defendants pray that the complaint be dismissed and for such other and further relief to which they may be entitled.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,
Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney,
Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney,
Attorneys for defendants.

I hereby certify that I have this 25 day of June 1946 sent a copy of the foregoing answer, by official United States mail, to Covington, Burling, Rublee, Acheson & Shorb, Union Trust Building, Washington, D. C.

Daniel B. Maher,
DANIEL B. MAHER,
Assistant United States Attorney.

117 In the District Court of the United States
for the District of Columbia

Civil Action File No. 34268

[Title omitted.]
[File endorsement omitted.]

Motion for preliminary hearing

Filed Sept. 9, 1946

Plaintiff moves the court, pursuant to Rule 12 (d) of the Federal Rules of Civil Procedure, to hear and determine before trial the third defense pleaded in defendants' answer herein, on the ground that the issues raised by said defense may be determined separately from the other issues in the case and that if the said issues are decided adversely to plaintiff, it will make it unnecessary to try the other issues in the case.

Wm. Merrick Parker,
WM. MERRICK PARKER,
Attorney for Plaintiff,
701 Union Trust Building, Washington, D. C.

118 In the District Court of the United States
for the District of Columbia

Civil Action File No. 34268

[Title omitted.]
[File endorsement omitted.]

Motion of defendants for summary judgment, notice of motion, and affidavits

Filed Sept. 27, 1946

The defendants, upon the pleadings herein, and upon the annexed affidavits, respectfully move the Court for summary judgment in favor of the defendants on the ground that there are no genuine issues as to any material fact and defendants are entitled to such judgment as a matter of law.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General,
Edward M. Curran,
EDWARD M. CURRAN,
United States Attorney,
Attorneys for the Defendants.

119 In the District Court of the United States
for the District of Columbia

Civil Action File No. 34268

HARRY W. HUBICKEY, PLAINTIFF

v.

HARRY B. MITCHELL, LUCILLE FOSTER MCMILLIN, ARTHUR S. FLEMING, DEFENDANTS

Order

Filed Nov. 7, 1946

This cause came on to be heard on motion of defendants for a summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure and the court having considered the pleadings and the affidavits of F. A. Crisp, Chester A. Anderson, and Lawson A. Moyer in support of defendants' motion; and having heard oral argument; and having found that there is no genuine issue as to any material fact; and having concluded that plaintiff Harry W.

Hubickey is entitled to judgment as a matter of law, it is by the court this 7th day of November 1946:

Adjudged and declared: That plaintiff, as a man who served on active duty, although temporary, intermittent, and without pay, in the United States Coast Guard Reserve during a portion of World War II and who has been honorably separated from the Coast Guard Reserve which was a portion or branch of the armed services of the United States, is entitled to the preference in employment created by the Veterans' Preference Act of 1944.

120 And it is further adjudged, ordered, and decreed: That defendants Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming shall forthwith classify plaintiff Harry W. Hubickey as a preference eligible pursuant to the Veterans' Preference Act of 1944 (5 United States Code, Section 851 et seq.) and that said defendants having granted said preference to said plaintiff shall thereafter refrain from denying preference eligibility to plaintiff or from in any manner taking any action which will deny to plaintiff such status.

T. ALAN GOLDSBOROUGH,
Justice.

Not objected to as to form.

JOHN F. SONNETT,
Attorney for Defendants.

121 In the District Court of the United States

Civil Action No. 34267

Civil Action No. 34268

[Titles omitted.]

WASHINGTON, D. C., *October 17, 1946.*

The above-entitled causes came on for hearing on a motion for summary judgment before Hon. T. Alan Goldsborough, Associate Justice, at 2 o'clock p. m.

122 Appearances: On behalf of the plaintiffs: John Burling, Esq. On behalf of the defendants: Frank Hayden, Esq., Ralph B. Gregg, Esq., of the Indiana Bar, representing the American Legion. Arthur M. Gladstone, Esq., of the New York Bar, representing the Coast Guard League.

Conclusion of the court
(After oral argument)

The COURT. Gentlemen, I don't have any difficulty about this case at all. The statute is as follows and includes among those entitled to Federal Employment preference "those ex-service men

and women who have served on active duty in any branch of the armed forces of the United States during any war or any campaign or expedition for which a campaign badge has been authorized, and have been separated therefrom under honorable conditions."

Now, of course, it is not contended that under the letter of what I have just read there can be any doubt that these petitioners are included, but the contention is made that the Court has the right by construction, to say that Congres could not have had in mind individuals of the class of these plaintiffs, because of the fact that in practice, while they could have been—after they had once
123 signed up—they could have been called into active and continuous service as a matter of practice they only served during certain hours of the night, retaining their civilian positions.

Now, what right have I to place such a construction upon the Act?

These men when they were called out were admittedly sailors, and during the time they were out—I used that expression "at night" in this service they were subject in every respect to the duties and obligations of being sailors—there were not "guerillas," they would have been entitled to the protection under international law that a sailor is entitled to.

Now, of course, when an Act of Congress is subject to construction or interpretation and the Court can give an interpretation which the Court feels is carrying out the real purpose of Congress, the Court has the right to interpret and construe it. There is no doubt whatever in the Court's mind that there is no room for construction in Section 4 of this Act providing for persons entitled to Federal Employment preference and that the claimants here come within the terms of that section, and the relief of summary judgment now requested by the plaintiffs will be granted.

124 REPORTER'S CERTIFICATE

I, O. H. Frost, one of the official reporters for the District Court of the United States for the District of Columbia, hereby certify that the foregoing is the official transcript of the Court's conclusions in the above-entitled causes.

O. H. FROST,
Official Reporter.

125 In the District Court of the United States
for the District of Columbia

Civil Action No. 34268

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed Nov. 19, 1946

Notice is hereby given that Harry B. Mitchell, Lucille Foster McMillin, and Arthur S. Flemming, the defendants above named, hereby appeal to the Court of Appeals for the District of Columbia from the order of injunction entered in this action on November 6, 1946.

Dated November 19, 1946.

John F. Sonnett,
JOHN F. SONNETT,
Assistant Attorney General.

George Morris Fay,
GEORGE MORRIS FAY,
United States Attorney,
Attorneys for the Defendants.

Copies sent to: Gerhard Gesell, Union Trust Building. William Merrick Parker, Union Trust Building.

126 In the United States Court of Appeals for the District of Columbia

No. 9446, January Term, 1947

HARRY B. MITCHELL ET AL., APPELLANTS

vs.

JACK W. COHEN, APPELLEE

No. 9447, January Term, 1947

HARRY B. MITCHELL ET AL., APPELLANTS

vs.

HARRY W. HUBICKEY, APPELLEE

Minute entry

Jan. 24, 1947

Argument commenced by Mr. Richard E. Guggenheim, attorney for appellants, continued by Mr. Spencer Gordon, attorney for appellees, and concluded by Mr. Richard E. Guggenheim.

127 In United States Court of Appeals, District of Columbia

[File endorsement omitted.]

No. 9446

HARRY B. MITCHELL, FRANCES PERKINS, AND ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

v.

JACK W. COHEN, APPELLEE

No. 9447

HARRY B. MITCHELL, FRANCES PERKINS, AND ARTHUR S. FLEMMING, INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

v.

HARRY W. HUBICKEY, APPELLEE

Appeals from the District Court of the United States for the District of Columbia

Argued January 24, 1947—Decided March 24, 1947

Mr. Richard E. Guggenheim, Attorney, Department of Justice, with whom Mr. J. Francis Hayden, Special Assistant to the Attorney General, Mr. Ellis Lyons, Attorney, Department of Justice, and Mr. George Morris Fay, United States Attorney, were on the brief, for appellants.

Mr. Spencer Gordon, with whom Mr. Gerhard A. Gesell was on the brief, for appellees.

Messrs. John Lewis Smith and Joseph J. Malloy, on behalf of the American Legion, filed a brief as amicus curiae, urging reversal.

Messrs. Robert P. Smith, William B. Ristig and Robert V. Smith, on behalf of James A. MacKenzie, filed a brief as amicus curiae, urging affirmance.

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

Opinion

Filed March 24, 1947

PRETTYMAN, J.: Appellees, having been denied veterans' preferences and having been, or being about to be, discharged
128 from their civilian positions in the War and Navy Depart-

ments; respectively, brought civil actions for injunctions against the Civil Service Commission and for declaratory judgments. Their claims were for preference in federal employment under the Veterans' Preference Act of 1944.[1] Summary judgments were entered for them. The members of the Commission, named as defendants individually and officially, appealed. The cases were consolidated for argument and decision in the court below and also in this court.

The Act provides that in certification for appointment, and in retention in civilian positions in Government employ, preference shall be given to "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war, * * * and have been separated therefrom under honorable conditions."[2]

It is not disputed by the Commission that appellees served on active duty with a branch of the armed forces during the recent war; nor is it disputed that they were separated therefrom under honorable conditions. So much is specifically stated in its brief. The Commission says that appellees are not "ex-servicemen." It says that the word is not defined in the statute and has no clear-cut legal significance when separated from its context, but that when read with the Act as a whole its meaning is quite clear.

These appellees were enrolled as temporary members of the United States Coast Guard Reserve. This was by statute a component part of the Coast Guard, in war a part of the Navy; and its organization, general duties and the powers of the Commandant relative thereto were designated by statute.[3] Appellees took the oath of allegiance required of regular members of the Coast Guard. The period of enrollment was the duration of the war. They enrolled for, and were assigned to, duty in the Volunteer Port Security Force. As such, they relieved regular Coast Guard personnel in the protection of ports and waterfronts and patrolled those waterfronts. A number of them were injured and killed in the line of duty. They were on active duty only as directed and for a minimum of twelve hours a week. Their active duty was, in fact, part-time. While on duty, and en route to and from duty, they wore regular Coast Guard uniforms; had military status; were vested with the same powers and authority as members of the regular Coast Guard with the same rank, grade or rating; were subject to the laws, regulations and orders of the Coast Guard and to its disciplinary action; received food and quarters; and, in case of sickness or disease contracted while on duty, were entitled to the same treatment as were regular Coast

[1] Act of June 27, 1944, 58 Stat. 387, 5 U. S. C. A. § 851.
[2] Sec. 2 of the Act.
[3] Act of Feb. 19, 1941, 55 Stat. 11, as amended, 14 U. S. C. A. § 301 et seq.

129 Guardsmen. They received no compensation for their service; were not subject to transfer without their consent; were not exempt from registration or liability for service under the Selective Service Act; were permitted to retain civilian employment; and, in case of injury or death, were entitled to only the benefits bestowed upon civilian employees.

The Commission says that three of the foregoing features of appellees' service are sufficient to bar their preference: (1) that they could retain their civilian employment; (2) that they remained subject to the draft; and (3) that they could be transferred only with their consent. It says that because of these features appellees are not "ex-servicemen," although they served on active duty with a branch of the armed forces during the war. It says that "The question of who is a veteran cannot be defined by easy formula" and that "the scope of the group included in any such statute can only be defined in terms of purpose of that statute."

Either of two considerations determines the matter, in our opinion. In the first place, we think it plain that one who has taken the military oath of service, who is a member of a component of the armed forces, who is subject to and actually engaged in military duty, and who is governed by the rules of military discipline, is a "serviceman". The problem is not unlike that decided in United States v. Tyler.[4] The question there was whether an army officer who had been retired for more than twenty years, was "in the service". The Court said:

"It is impossible to hold that men who are by statute declared to be a part of the army, who may wear its uniform, whose names shall be borne upon its register, who may be assigned by their superior officers to specified duties by detail as other officers are, who are subject to the rules and articles of war, and may be tried, not by a jury, as other citizens are, but by a military court martial, for any breach of those rules, and who may finally be dismissed on such trial from the service in disgrace, are still not in the military service.

"If Congress chose to provide for their qualified relief from active duty, and for a diminished compensation, it did not discharge them from their other obligations as part of the Army of the United States. * * *"[5]

In United States v. Morton,[6] the Supreme Court held that the "service" of an army officer began when he executed the sworn

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[4] 105 U. S. 244, 26 L. Ed. 985 (1882).

[5] See also to the same effect Wood v. United States, 107 U. S. 414, 417, 27 L. Ed. 542, 2 S. Ct. 551 (1883); Badeau v. United States, 130 U. S. 439, 32 L. Ed. 997, 9 S. Ct. 579 (1889); Kahn v. Anderson, 255 U. S. 1, 65 L. Ed. 469, 41 S. Ct. 224 (1921); 29 Op. Atty. Gen. 397 (1912); Morgenthau v. Barrett, 71 App. D. C. 148, 108 F. 2d 481 (1939). The latter decision led to an amendment of Sec. 113 of the Criminal Code by an Act of Oct. 8, 1940, 54 Stat. 1021, 18 U. S. C. A. § 203.

[6] 112 U. S. 1, 28 L. Ed. 613, 5 S. Ct. 1 (1884).

agreement to serve and took the oath of office as a cadet at West Point. The Supreme Court had before it, in Billings v. Truesdell,[7] the question as to when a registrant is inducted into
130 service, and held that he is actually inducted when "he undergoes whatever ceremony or requirements of admission the War Department has prescribed," which in the recent war was "a short, dignified ceremony in which the men are administered the oath."

Similar problems have frequently arisen in respect to Government employ in civilian capacity. Criminal statutes[8] impose certain restrictions upon such persons, and the Attorney General and the courts have had to determine from time to time the status of particular ones. The question arose in acute form concerning the members of War Price and Rationing Boards and the Selective Service Boards. Their services were part-time, voluntary and without compensation, but an oath of office was required and the appointments involved governmental duties.[9] The Attorney General held[10] that a member of a War Price and Rationing Board was an "officer or clerk in the employ of the United States" within the meaning of Section 113 of the Criminal Code. That Congress regarded the members of the Selective Service Boards, Rationing Boards, and Alien Enemy Hearing Boards as officers or clerks in the employ of the United States, regardless of the temporary, voluntary and unpaid character of their services, is shown by the enactment of statutes specifically exempting them from the criminal statutes applicable to such officers and employees.[11]

Thus, distinctions between those in and those not in service, heretofore proposed in other situations, based upon part-time, voluntary or unpaid service, have been rejected both as to military service and as to Government "employ." It would unsettle many established rules if a departure from the simple test were now inaugurated.

The Commission says that appellees have fewer indicia of veterans' status than do many civilians who served with the armed forces. It points to Red Cross representatives who accompanied combat troops in the field, civilian technicians stationed in combat zones, and members of the Civil Air Patrol as examples of those with greater indicia of service status. But it seems to us that

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[7] 321 U. S. 542, 88 L. Ed. 917, 64 S. Ct. 737 (1944).
[8] Secs. 109 and 113 of the Criminal Code, 18 U. S. C. A. §§ 198, 203.
[9] See Selective Service Regulations (3d printing, 2d ed.) pars. 602.2, 602.4, as to Selective Service Boards; and Sec. 201 (a) of the Emergency Price Control Act of 1942, 56 Stat. 29, 50 U. S. C. A. App. § 921 (a), and O. P. A. Regs. 1315.201, 7 F. R. 73, in respect to War Price and Rationing Boards.
[10] 40 Op. Atty. Gen., Op. No. 74 (Dec. 9, 1943).
[11] Act of May 5, 1941, 55 Stat. 150, as amended Dec. 28, 1941, 55 Stat. 861, and Dec. 20, 1944, 58 Stat. 838; Act of April 4, 1944, 58 Stat. 189.

the adoption of any such evaluation of comparative indicia, instead of the simple established test, for the difference between a civilian and a serviceman, would lead at once into a hopeless morass. The civilians mentioned by the Commission have more of these suggested indicia than do army officers or men who performed "paper work" in offices in this country and lived with their families.
131 But nobody would argue that the latter were not in the service. Also, these temporary Coast Guardsmen have greater indicia of that sort than do many of those officers and men. They performed dangerous active duty offshore, and a number of them were killed. To distinguish between those in and those not in service by a comparison of indicia as suggested by the Commission would be an impossible task and wholly unjustified by the simple statutory word "servicemen."

The Commission says that the limitation on appellees' service, in that they could not be transferred without their consent, shows that they were not in the service. But there were limited services even for men inducted by Selective Service processes. There was a limited noncombatant service, and limited service due to physical causes, such as "cannot march," "cannot do heavy work," "insufficient vision for fine work," and "can do sedentary work." [12] No one would contend that such people, having been inducted, were not in the service. The Women's Reserve of the Navy was a branch of the Naval Reserve,[13] which was a component part of the United States Navy,[14] but its duties were restricted by statute. Its members could not be assigned to duty on board vessels of the Navy and could be assigned to duty outside the continental United States only upon their prior request.[15] It is certainly generally understood that this limitation upon service did not negative the Waves' "service." There was also a Limited Service Marine Corps Reserve which was a part of the Marine Corps Reserve and a component part of the United States Marine Corps.[16] Thus, it is clear beyond question that, as a generality, limited service is nevertheless service. What then is the critical difference between a limitation which prevents transfer of station without consent, and one which prevents transfer to a station outside the United States without consent? Or between a geographical limitation and a functional limitation? The Commission does not suggest, and we do not perceive, any critical distinction between types of limitation which could be the criterion for holding some limited service to be service, but contrariwise as to other such service. The

[12] Classifications I–A–O, I–B, I–B–O, Selective Service Regulations (1st ed.) pars. 328, 343, 364, 604, 613.
[13] U. S. C. A. § 857.
[14] 34 U. S. C. A. § 853.
[15] 34 U. S. C. A. § 857c.
[16] 34 U. S. C. A. § 853 (a) and (b).

word "servicemen" does not, in our opinion, have any inherent restriction based upon different types of limitation upon service. The limitations upon appellees' service were not inherent in the organization as created by statute but were by way of prescription of the Commandant and the subsequent agreement of the members.

The statute gave the Commandant, with the approval of
132 the Secretary, power to enroll members and to prescribe their duties, "including but not limited to part-time and intermittent active duty with or without pay."[17] That these appellees were on part-time active duty and without pay was due to the Commandant's directions, formally agreed to by them upon enrollment. He enrolled temporary reservists for various classes of duty, prescribed by him in general orders. Some classes received pay, and some did not; some were part-time, and some were not; some were subject to transfer of station, and some were not. But all were temporary members of the Coast Guard Reserve, enrolled, as the statute provides,[18] "for duty under such conditions as he [the Commandant] may prescribe." Status, as military or civilian, cannot be determined by a formula derived from a commanding officer's prescription of duties for particular members of his command. So much is obvious. This command itself was by statute a component of the armed forces. What the commanding officer did with its members is immaterial to their status.

The Commission does not suggest any formula for segregating members of a component of the armed forces into those in and those not in the service. It merely advances reasons for denying preference to this particular class. We are not told what weight the Commission would give the voluntary feature, or the nonpay feature, or the part-time feature. No general regulation applicable to all classes has been proposed, so far as we are advised.

That the service of these temporary reservists was part-time is immaterial, both upon the precedents we have cited and upon reason. A man who is in the service for one week is certainly in the service. One who is there half or a fourth of his time is certainly there for that time. He is a serviceman of some variety. There may be varieties of servicemen, but this statute merely says "ex-servicemen."

The contention of the Commission that Congress did not intend to confer preference on those who continued normal civilian employment during the war, is completely refuted by the fact that in the same paragraph of the Act Congress gave the same preference eligibility to the unmarried widows of deceased servicemen. Generally speaking, the wives of servicemen continued normal

[17] 14 U. S. C. A. § 307.
[18] 14 U. S. C. A. § 307.

civilian employment during the war. And, in any event, Congress wrote no such restriction as the Commission now proposes.

The Commission points to the provision that temporary reservists in the Coast Guard were not exempted from registration and liability for service under Selective Service as were other members of the Reserve. But the Commission tells us in its brief that it has granted preference to one class of these temporary
133 reservists. Moreover, that a man in one type of service is liable to anther type is not a denial that he is in the service; for example, as in United States v. Tyler, supra, that a retired army officer might be called to active, full-time, paid duty did not negative his service status while he was retired.

The second conclusive consideration upon the question is the administrative and legislative history of the question. On April 4, 1944, the Civil Service Commission issued a Circular Letter (No. 4145), in which it held that temporary reservists under the Coast Guard Auxiliary and Reserve Act of 1941, whether full-time, part-time, or intermittently, either with or without pay, were considered to be in active service and were entitled to preference. The Veterans' Preference Act became effective June 27, 1944. It contained a provision that "this Act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." [19] On November 4, 1944, the Commission reversed its former ruling and withdrew the preference,[20] giving rise to the present litigation. Both appellees were enrolled in the Coast Guard before this latter ruling. It requires no elaboration to emphasize the conclusion that this history supports appellees' contentions as to the meaning of the Act.

Amicus curiae American Legion says that in many respects the status of appellees is similar to that of those who formerly served in the Women's Army Auxiliary Corps under Public Law 554, 77th Cong., 2d Sess. (1942).[21] The illustration well serves the point. That Act of May 14, 1942, specifically provided that "The corps shall not be a part of the Army, * * *." [22] But that Act was repealed July 1, 1943, and a new Act passed which provided that "There is hereby established in the Army of the United States, * * * a component to be known as the 'Women's Army Corps'. * * * The enlisted personnel of such corps shall consist of women * * * who are enlisted in the Army of the United States. * * *" [23] Thus, the former corps, the WAAC,

[19] Sec. 18 of the Act, 5 U. S. C. A. § 867.
[20] Departmental Circular 508.
[21] 56 Stat. 278.
[22] Sec. 12 of the Act, 56 Stat. 281.
[23] 57 Stat. 371, 50 U. S. C. A. App. §§ 1551–1555.

was specifically, by statute, not in the Army, whereas the latter corps, the WAC, was. It could hardly be denied that the members of the latter were in the service.

We hold that a person who has taken the oath as a member of a component of the armed forces and, as such, has been on naval duty, in the regular uniform of the command, with the perquisites of rank of the regular members, and has been subject to military discipline and liable to separation under dishonorable con-
134 ditions, is an ex-serviceman. In the language of the Court in United States v. Tyler, supra, it would be impossible to hold that such a person is not in the service. It would indeed be an anomaly to hold that a petty officer in command of a Coast Guard vessel on antisubmarine duty offshore was not in the service while the men under him were.

The Commission presents arguments of policy as to why these temporary reservists should not be granted the preference privilege. Those considerations are not for the courts. Congress used a simple word, "ex-servicemen," and made two limitations upon its grant of the privilege to them, namely, that they must have served on active duty with the armed forces in war, and that they must have been separated from the service under honorable conditions. The courts cannot write further exceptions into the statute. They must apply what Congress has provided. Views as to other policies should be presented to the Congress, together with such recommendations as the Commission may deem advisable. The doors of Congress are open to the Commission, and the members are readily accessible. If the Congress wished to make further exceptions to the privilege, it could, and no doubt would, describe them with particularity. If it wished to exclude the temporary reservists of the Coast Guard from the preference, it could do so, by name and simply; but the courts cannot. The courts cannot rewrite the statute, and they should not inaugurate the confusion which would be caused by interpreting the simple word "ex-servicemen" by some unrestricted evaluation of indicia based on the time spent on active duty, the nature of the Commandant's prescription of duties, or the extent or existence of pay. The treatment to be given ex-servicemen is peculiarly a legislative problem. It is involved in many statutes. When Congress says simply "ex-servicemen," and then excludes certain ones, it is not for the Commission or the courts to set up other standards. Not only are the courts not empowered to rewrite plain terms in a statute, but they are not equipped to write formulae of general application upon a subject of so great variation in its facts.

(Affirmed.)

Dissenting opinion

EDGERTON, J., dissenting: The Commission's understanding of the term "ex-servicemen" is in accordance with ordinary usage. The court's construction conflicts with ordinary usage. When one speaks of ex-servicemen one is not speaking of men who always remained subject to draft; who lived at home and could not, except through the machinery of the draft, be ordered to leave home; who constantly carried on their regular civilian occupations as usual; and whose connection with the armed forces involved only part-time unpaid work which entitled them only to civilian benefits in case they were injured. The court's basic error is in its assumption that the meaning of the term does not depend on
135 usage but can be found by analysis. Arguing that if men performed service they must be ex-servicemen is much like arguing that if men work they must be workmen and if mothers are grand they are grandmothers.

The context also conflicts with the court's construction. That construction makes the statutory language, "those ex-servicemen and women who have served on active duty in any branch of the armed forces of the United States, during any war," mean just what it would have meant if Congress had used the word "persons" instead of the phrase "ex-servicemen and women." It is unlikely that Congress used the somewhat awkward phrase as a mere synonym for the simple word.

The Commission's construction, besides being the one that usage and context require, is "also more consonant with the legislative purpose"[1] which is stated in the title of the Act: "to give honorably discharged veterans, their widows, and the wives of disabled veterans, * * * preference in employment * * *." Congress intended to aid in the rehabilitation and reemployment of "veterans." It is paradoxical to suggest that Congress intended to include, and aid in the rehabilitation and reemployment of, a whole class of men whose regular employment and way of life were never interrupted. To extend employment preference to men in appellees' situation will weaken the competitive position of the veterans whom Congress intended to help. It will also weaken the competitive position of the munitions makers, and the many other employees both public and private, who did essential war work but have been given no preference.

Plainly a "preference eligible" is a person eligible for employment and entitled to preference. The only men to whom the act gives a preference are "ex-servicemen." No one contends that appellees were, or ever had been, ex-servicemen either on June 27,

[1] Board of Governors of Federal Reserve System v. Agnew, U. S. 15 L. W. 4122, 4123, decided Jan. 6, 1947.

1944, when the act was passed, or on November 4, 1944, when the Commission corrected its erroneous ruling. On both those dates appellees' service, such as it was, was still going on. Since appellees were not and never had been ex-servicemen on either date, they were not and never had been preference eligibles on either date. Clearly, therefore, they are not within the proviso that "this act shall not be construed to take away from any preference eligible any rights heretofore granted to, or possessed by, him under any existing law, Executive order, civil-service rule or regulation, of any department of the Government or officer thereof." [2] It is unnecessary to consider whether "rights" could, in any case, have been "granted" by a Commission ruling not in accordance with law.

136 In United States Court of Appeals
for the District of Columbia

No. 9446—January Term, 1947.

[File endorsement omitted.]

HARRY B. MITCHELL, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

vs.

JACK W. COHEN, APPELLEE

No. 9447—January Term, 1947

HARRY B. MITCHELL, ET AL., INDIVIDUALLY AND AS MEMBERS OF THE CIVIL SERVICE COMMISSION, APPELLANTS

vs.

HARRY W. HUBICKEY, APPELLEE

Appeals from the District Court of the United States for the District of Columbia

Before EDGERTON, WILBUR K. MILLER, and PRETTYMAN, JJ.

Judgment

Filed March 24, 1947

These appeals came on to be heard on the transcripts of the record from the District Court of the United States for the District of Columbia, and were argued by counsel.

[2] 58 Stat. 391, § 18, 5 U. S. C. Supp. V, § 867.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgments of the said District Court appealed from in these causes be, and the same are hereby affirmed.

Per Mr. Justice PRETTYMAN.

Dated March 24, 1947.

Dissenting opinion by Mr. Justice Edgerton.

137 In United States Court of Appeals
for the District of Columbia

No. 9446

No. 9447

[Titles omitted.]

[File endorsement omitted.]

Designation of record

Filed May 15, 1947

The Clerk will please prepare a certified transcript of record for use on petition to the Supreme Court of the United States for writ of certiorari in the above-entitled cause, and include therein the following:

1. Joint Appendix.
2. Minute entry of argument.
3. Opinion of Court of Appeals.
4. Judgment.
5. This designation.
6. Clerk's certificate.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

Service of copy of the above designation of record in the above-entitled case is hereby acknowledged this 15th day of May 1947.

SPENCER GORDON,
Of Counsel for Appellee.

139 In the Supreme Court of the United States

No. 9446

No. 9447

[Titles omitted.]

Stipulation as to record

Subject to this Court's approval, it is hereby stipulated and agreed by and between counsel for the respective parties of the above-entitled case that:

1. For the purpose of the petition for a writ of certiorari the printed record shall consist of the following:

a. The Joint Appendix.

b. The proceedings had before the United States Court of Appeals for the District of Columbia as set forth in the Designation of Record filed by the petitioner.

2. Petitioner will cause the Clerk of the United States Court of Appeals for the District of Columbia to file with the Clerk of the Supreme Court the entire transcript of the record and original exhibits in the Court of Appeals for the District of Columbia, and the parties may refer in their briefs in connection with the petitioner for certiorari to the transcript and exhibits including any parts which have not been printed.

3. In the event the petition for writ of certiorari is granted, the printed record shall consist of the material specified in
140 paragraph (1) above and such portions of the entire transcript of record as the parties may designate.

George T. Washington,
GEORGE T. WASHINGTON,
Acting Solicitor General.

May 15, 1947.

GERHARD A. GESELL,
Of Counsel for Appellee.

May 19, 1947.

141 In the Supreme Court of the United States

No. 130

No. 131

[Titles omitted.]

Stipulation designating portions of the record to be printed

Filed Nov. 5, 1947

It is hereby stipulated and agreed by and between counsel for the respective parties that:

A. The following portions of the transcript of the record in the above-entitled causes shall be printed:

No. 130

	Pages of the transcript
1. Complaint and exhibits	1–11
2. Answer	12–13
3. Plaintiffs' motion for summary judgment	14–15
4. Affidavit of Jack W. Cohen	16–17
5. Motion of Defendants for Summary Judgment, Notice of Motion, and Affidavits	18

Pages of the transcript

142 6. Affidavit of Chester A. Anderson 19–22
7. Affidavit of Lawson A. Moyer 23–26
8. Exhibit 1 to 4, inclusive, to Moyer affidavit 27–34
9. Exhibit 5 to Moyer affidavit (except the portion of page 36 of the transcript beginning with "Section 23 (a)—Deductions from Gross Income: Expenses" and continuing to the end of the page) 35–36
10. Exhibit 6 to the Moyer affidavit 37–46
11. Affidavit of F. A. Crisp 47–48
12. Memorandum to Acting Secretary of the Navy, dated 22 August 1944 50–52
13. Second endorsement of 16 Sept. 1944 to Memo SECP-290, wh. of 22 August 1944, to Acting Sec. Nav 53–55
14. Order of the District Court, filed October 25, 1946 93–94
15. Notice of Appeal 100

No. 131

1. Complaint and Exhibits 1–12
2. Answer 13–14
3. Plaintiffs' motion for preliminary hearing 15
4. Motion of Defendants for Summary Judgment, Notice of Motion, and Affidavits 16
5. Order of the District Court 91–92
6. Notice of Appeal 98

Nos. 130 and 131 (combined)

1. Conclusions of the Court (after Oral Argument), October 17, 1946. (No. 130, pp. 95–99) (No. 131, pp. 93–97).
2. Record of proceedings had before the United States Court of Appeals for the District of Columbia including:
a. Minute entry of argument.
b. Opinion of Court of Appeals.
c. Judgment.
143 3. Designation of Record filed in Court of Appeals dated May 15, 1947.
4. Stipulation filed in this Court dated May 15, 1947 and May 19, 1947.
5. This stipulation.

B. The affidavits of Chester A. Anderson, Lawson A. Moyer, and F. A. Crisp, and exhibits thereto, forming part of the record in No. 130 and designated above to be printed are identical with the affidavits of Chester A. Anderson, Lawson A. Moyer, and F. A. Crisp, and exhibits thereto, which form part of the record in No. 131. The latter affidavits and exhibits are not designated

to be printed in order to avoid unnecessary duplication, but it is agreed that the said affidavits and exhibits form part of the record in both cases and in both cases the parties may refer in briefs or argument to these affidavits and exhibits.

Philip B. Perlman,
PHILIP B. PERLMAN,
Solicitor General.
GERHARD A. GESELL,
Counsel for Respondents.

Dated November 3rd, 1947.

144 [File endorsement omitted.]

145 Supreme Court of the United States

No. 130—October Term, 1947

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

146 Supreme Court of the United States

No. 131—October Term, 1947

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:] File Nos. 52351, 52352. U. S. Court of Appeals, District of Columbia. Term No. 130. Harry B. Mitchell, Frances Perkins, Arthur S. Fleming, Individually and as Members of the Civil Service Commission, Petitioners vs. Jack W. Cohen. Term No. 131. Harry B. Mitchell, Frances Perkins, Arthur S. Fleming, Individually and as Members of the Civil Service Commission, Petitioners vs. Harry W. Hubickey. Petition for writs of certiorari and exhibit thereto. Filed June 13, 1947. Term Nos. 130 O. T. 1947, 131 O. T. 1947.

U. S. GOVERNMENT PRINTING OFFICE: 1947